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# The Endurance of Prosecutorial Immunity---How the Federal Courts Vitiated Buckley v Fitzsimmons

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# THE ENDURANCE OF PROSECUTORIAL IMMUNITY—HOW THE FEDERAL COURTS VITIATED *BUCKLEY V. FITZSIMMONS*

> Between the private life of the citizen and the public glare of criminal accusation stands the prosecutor.[1]

## I. INTRODUCTION

When the United States Supreme Court handed down its opinion in *Buckley v. Fitzsimmons* in June 1993,[2] the decision was heralded as the beginning of the end of absolute prosecutorial immunity.[3] Prior to *Buckley*, a state or federal prosecutor accused of inflicting a constitutional harm through prosecutorial misconduct and sued in his or her individual capacity could claim absolute immunity from civil suit.[4] If the alleged acts were found to be intimately related to the judicial phase of the criminal process and to the prosecutor's role as an advocate, the plaintiff's case would fail.[5] With *Buckley*, the commentators announced, the Supreme Court had dealt an unprecedented blow to this tradition of immunity, sending an unmistakable message to overzealous prosecutors.[6] No longer would acts that are only tangentially related to prosecution be afforded full protection from liability.[7] No longer would the federal courts hearing these civil rights actions be able simply to shield pre-indictment acts with the same immunity accorded to the ensuing prosecution.[8] The Supreme Court had drawn

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[1] Young v. United States *ex rel.* Vuitton et Fils S.A., 481 U.S. 787, 814 (1987).

[2] Buckley v. Fitzsimmons, 509 U.S. 259 (1993).

[3] *See, e.g.*, Thomas J. Foltz, *A Shaky Bridge Over Troubled Water: Prosecutorial Immunity No Longer Absolute*, 8 CRIM. JUST., Winter 1994, at 21, 61; Brian P. Barrow, Note and Comment, Buckley v. Fitzsimmons: *Tradition Pays a Price for the Reduction of Prosecutorial Misconduct*, 16 WHITTIER L. REV. 301, 303, 325 (1995); James P. Kenner, Note, *Prosecutorial Immunity: Removal of the Shield Destroys the Effectiveness of the Sword*, 33 WASHBURN L.J. 402, 425–27 (1994); Deborah S. Platz, Note and Comment, Buckley v. Fitzsimmons: *The Beginning of the End for Absolute Prosecutorial Immunity*, 18 NOVA L. REV. 1919, 1939 (1994); Richard C. Reuben, *Court Narrows Suit Immunity for Prosecutors: Limit for Probes, Remarks*, L.A. DAILY J., June 25, 1993, at 1.

[4] *See, e.g.*, Imbler v. Pachtman, 424 U.S. 409, 416–17, 431 (1976).

[5] *See, e.g., id.*

[6] *See, e.g.*, sources cited *supra* note 3.

[7] *See, e.g.*, sources cited *supra* note 3.

[8] *See, e.g.*, sources cited *supra* note 3.

a line, it was reported, that on its face purported only to withdraw absolute immunity for prosecutorial acts prior to the existence of probable cause to arrest, but that might have far broader implications.[9]

Whatever threat *Buckley* may have posed to the highly deferential doctrine of prosecutorial immunity, however, has not yet materialized. This Note argues that the federal circuit courts have not read *Buckley*'s arguably ambiguous holding to significantly alter their application of immunity doctrine.[10] Rather, it appears that the doctrine of absolute prosecutorial immunity has emerged largely unchanged.[11] This Note first examines the holding in *Buckley v. Fitzsimmons* and the issues left unresolved by that decision.[12] It then argues that rather than resolving those ambiguities in favor of increased prosecutorial liability, the prosecutorial immunity cases decided by the federal circuit courts since *Buckley* have, explicitly or implicitly, interpreted *Buckley*'s holding so as to maintain pre-existing prosecutorial immunity doctrine.[13]

Part II gives a brief overview of § 1983 and *Bivens* claims, the typical forms in which victims of constitutional harms bring claims against prosecutors.[14] Part III describes and contrasts absolute and qualified immunity.[15] Part IV details the historical development of prosecutorial immunity, from the common law to the present.[16] Part V analyzes the holding in *Buckley* and its impact on pre-existing immunity doctrine.[17] Finally, Part VI reviews the federal circuit court prosecutorial immunity decisions since *Buckley* and argues that those courts have either disregarded the potential impact of *Buckley* or have resolved its ambiguities in favor of an unchanged absolute immunity doctrine.[18]

## II. Section 1983 and *Bivens* Claims Against Federal Prosecutors

An individual who claims that a state or federal prosecutor deprived that individual of his or her constitutional rights and who wishes to sue that prosecutor in his or her individual capacity typically files either a § 1983 claim, in the case of a state prosecutor, or a *Bivens*

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[9] *See, e.g.*, sources cited *supra* note 3.
[10] *See* discussion *infra* part V.
[11] *See* discussion *infra* part V.
[12] *See infra* notes 146–222 and accompanying text.
[13] *See infra* notes 223–338 and accompanying text.
[14] *See infra* notes 19–38 and accompanying text.
[15] *See infra* notes 39–55 and accompanying text.
[16] *See infra* notes 56–184 and accompanying text.
[17] *See infra* notes 185–222 and accompanying text.
[18] *See infra* notes 223–338 and accompanying text.

claim, when the prosecutor derives his authority from federal law.[19] A cause of action exists under 42 U.S.C. § 1983, originally passed as section 1 of the Civil Rights Act of 1871, against any person who, under color of *state* law, subjects any other person to a deprivation of his or her statutory or constitutional rights.[20] The ability to redress a deprivation of a constitutional right by a federal actor, however, is not derived from a statute, but rather was established by the United States Supreme Court in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*.[21] The law applicable to a *Bivens* claim against a federal official mirrors that applicable to a § 1983 claim against a state official.[22]

In 1971, in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, the Supreme Court recognized a cause of action for damages against officials who violate a person's constitutional or statutory rights while acting under color of *federal* law.[23] In *Bivens*, Webster Bivens filed suit in federal district court claiming that agents of the Federal Bureau of Narcotics, acting under color of federal authority and in violation of his Fourth Amendment rights, conducted a warrantless search of his apartment and employed unreasonable force in his arrest for alleged narcotics violations.[24] The district court dismissed his complaint for failure to state a cause of action, and the United

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[19] *See* 42 U.S.C. § 1983 (1994); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971). The plaintiff may also file additional claims against the prosecutor under other statutory provisions, or state tort law or a state constitution, and may file any number of claims against other actors, such as the federal government under the Federal Tort Claims Act, 28 U.S.C. §§ 2671–2680 (1994). *See, e.g.*, Moore v. Valder, 65 F.3d 189, 191 (D.C. Cir. 1995) (claims under *Bivens* and Federal Tort Claims Act); Giuffre v. Bissell, 31 F.3d 1241, 1244 n.3 (3d Cir. 1994) (claims under U.S. Constitution, §§ 1983 and 1986 and New Jersey law); Kohl v. Casson, 5 F.3d 1141, 1144–45 (8th Cir. 1993) (claims under § 1983, Nebraska Constitution, Nebraska Civil Rights Act and Nebraska tort law).

[20] 42 U.S.C. § 1983. Section 1983 reads in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983.

[21] *See* 42 U.S.C. § 1983; *Bivens*, 403 U.S. at 397.

[22] *See, e.g.*, Butz v. Economou, 438 U.S. 478, 504 (1978).

[23] 403 U.S. at 397. The *Bivens* Court only specifically recognized claims under the Fourth Amendment. *See* MARTIN A. SCHWARTZ & JOHN E. KIRKLIN, SECTION 1983 LITIGATION: CLAIMS, DEFENSES, AND FEES § 1.4, at 15 (2d ed. 1991). Following the *Bivens* decision, the United States Supreme Court recognized *Bivens*-type claims under certain other constitutional provisions. See *id.* at 15 n.86 for a sampling of those cases and their constitutional subjects.

[24] 403 U.S. at 389.

States Court of Appeals for the Second Circuit affirmed.[25] The agent-defendants had successfully argued that the only remedies for Fourth Amendment violations existed under state tort law, with the Fourth Amendment serving only to limit federal defenses to the state law suit.[26] The United States Supreme Court reversed, holding that because the Fourth Amendment provides an independent limitation on the exercise of federal power, a cause of action for constitutional deprivations by federal officers exists directly under the Fourth Amendment.[27]

The *Bivens* Court noted that Supreme Court caselaw long rejected the idea that the Fourth Amendment only prohibits conduct by federal officials that would be actionable if committed by private individuals under state tort law.[28] The Court reasoned that this broader sweep of the Fourth Amendment is necessary where a federal official's potential for inflicting harm on a citizen far exceeds that of a private individual.[29] For example, where the mere invocation of federal authority can render the private citizen virtually powerless to refuse or resist, it is clear that the interests protected by the Fourth Amendment search and seizure limitation differ significantly from those underlying state law trespass and privacy claims against private actors.[30] The Court noted that this special concern for the misuse of federal power is further evidenced by the fact that states are not authorized to broaden or limit federal authority.[31] The *Bivens* Court thus recognized a cause of action against federal officials who deprive an individual of his or her Fourth Amendment rights.[32]

The plaintiff in a § 1983 or *Bivens* claim may file a civil suit directly against the state or federal official and seek compensatory and punitive damages against that official in his or her personal capacity.[33] In addition to proving the elements of a § 1983 claim, a plaintiff charging prosecutorial misconduct relating to a wrongful conviction must first

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[25] *Id.* at 390.

[26] *Id.* at 390–91. In other words, if Bivens could prove the agents violated the Fourth Amendment, then the agents could not argue that their actions were a legitimate exercise of federal power. *See id.* at 391.

[27] *Id.* at 392, 397. The *Bivens* Court also reaffirmed the notion that money damages are an appropriate remedy for injuries resulting from a constitutional violation that amounts to an "invasion of personal interests in liberty." *Id.* at 395, 397.

[28] *Id.* at 392.

[29] *Bivens*, 403 U.S. at 392.

[30] *Id.* at 394–95.

[31] *Id.* at 395.

[32] *Id.* at 397. *Bivens* was a six-to-three decision. Justice Harlan wrote a concurring opinion, and Chief Justice Burger, Justice Black and Justice Blackmun each wrote dissenting opinions. *See id.* at 388.

[33] *See, e.g.*, Moore v. Valder, 65 F.3d 189, 191 (D.C. Cir. 1995).

establish that the prior criminal proceeding ended in the former defendant's favor.[34] For the plaintiff to recover damages for any § 1983 action that would, if successful, render the plaintiff's prior conviction or sentence invalid, the plaintiff must prove that the predicate conviction or sentence has already been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal, or been the subject of a federal court's issuance of a writ of habeas corpus.[35] In other words, until the challenged conviction or sentence has been officially invalidated, it cannot form the basis for a § 1983 claim.[36] The rules of immunity and other defenses available under § 1983 are, however, similarly available in a *Bivens* claim.[37] In both § 1983 and *Bivens* claims, the burden is on the defendant official to show that such immunity or defense appropriately applies to the alleged act.[38]

## III. Absolute vs. Qualified Immunity

Immunities available to defendant officials in § 1983 and *Bivens* claims can be classified into two types, absolute and qualified.[39] Absolute immunity provides an affirmative defense to officials whose special functions or constitutional status require complete protection from civil suit.[40] The Supreme Court only acknowledges absolute immunity where specially justified by public policy considerations.[41] Otherwise, there is a presumption that the affirmative defense of qualified immunity provides sufficient protection for official acts.[42]

There are crucial substantive and procedural differences between absolute immunity and qualified immunity to suit. The defense of absolute immunity can defeat a civil suit anytime after it has been filed, as long as the official's alleged acts are within the scope of the applicable immunity.[43] By contrast, though a defendant claiming qualified

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[34] Heck v. Humphrey, 114 S. Ct. 2364, 2372 (1994). The elements of a § 1983 claim may be stated as (1) a violation of a constitutional or federal statutory right; (2) proximately caused; (3) by a "person"; (4) who acted "under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia . . . ." Schwartz & Kirklin, *supra* note 23, § 1.4.

[35] *Heck*, 114 S. Ct. at 2372. The *Heck* decision also noted that the § 1983 plaintiff need not have exhausted his or her state remedies prior to filing the § 1983 claim. *Id.* at 2370.

[36] *Id.* at 2372.

[37] Briggs v. Goodwin, 569 F.2d 10, 17 n.8 (D.C. Cir. 1977), *cert. denied* 437 U.S. 904 (1978).

[38] Burns v. Reed, 500 U.S. 478, 486 (1991).

[39] Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982).

[40] *Id.* at 807.

[41] *See Burns*, 500 U.S. at 487; *Harlow*, 457 U.S. at 808.

[42] *Burns*, 500 U.S. at 486–87.

[43] Imbler v. Pachtman, 424 U.S. 409, 419 n.13 (1976). The defendant official may assert the

immunity may move for summary judgment, that defense does not immediately defeat the suit, but only introduces a standard against which the defendant-official's actions will be measured.[44]

In 1982, in *Harlow v. Fitzgerald*, the United States Supreme Court reformed qualified immunity doctrine by establishing an objective standard under which an official is only liable if he or she violates "clearly established statutory or constitutional rights of which a reasonable person would have known."[45] The Supreme Court replaced the old "good faith" qualified immunity standard, which included both subjective and objective components that were difficult and costly for courts to resolve, with this purely objective standard so as to facilitate the early dismissal of frivolous § 1983 or *Bivens* claims.[46] In the context of § 1983 or *Bivens* claims, the presumption is that qualified immunity provides a sufficient level of protection for the official function.[47] The Supreme Court views the qualified immunity doctrine as reflecting a reasonable balance between the need to protect individual rights and the public interest in promoting the "vigorous exercise of official authority."[48]

The Court has stated, furthermore, that the purely objective qualified immunity standard should not encourage or permit harassment litigation because federal courts can weed out insubstantial claims on

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immunity defense in a motion for dismissal under FED. R. CIV. P. 12(b)(6) for failure to state a claim upon which relief can be granted.

[44] *See Harlow*, 457 U.S. at 818–19; *Imbler*, 424 U.S. at 419 n.13.

[45] *See* 457 U.S. at 818. The Supreme Court granted certiorari in *Harlow* to determine the immunity available to senior presidential aides and advisors. *Id.* at 806. The plaintiff in *Harlow* had brought suit against former President Richard M. Nixon and two of his senior White House aides, claiming they conspired to violate his statutory and constitutional rights by unlawfully dismissing him from employment with the Department of the Air Force in retaliation for certain testimony before a congressional subcommittee. *See* Nixon v. Fitzgerald, 457 U.S. 731, 734, 740 (1982). The federal district court denied the defendants' motions for summary judgment, finding a sufficient *Bivens* claim under the First Amendment and finding that the aides lacked absolute immunity. *Harlow*, 457 U.S. at 805–06. The aides appealed the denial of immunity separately from the President. *Id.* For details of the alleged conspiracy and the President's appeal, see *Nixon*, 457 U.S. at 731.

[46] *Harlow*, 457 U.S. at 815–16, 818. The objective component involved a presumptive knowledge of the constitutional right at issue, while the subjective component focused on the official's intentions. *Id.* at 815. Qualified immunity would be defeated if the official "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury." *Id.* Yet many courts treated the official's subjective intent as a question of fact for the jury (under Rule 56 of the Federal Rules of Civil Procedure), often undermining the Court's promise that insubstantial claims would be defeated on summary judgment. *See id.* at 816.

[47] Burns v. Reed, 500 U.S. 478, 486–87 (1991); *see also Harlow*, 457 U.S. at 807.

[48] *Harlow*, 457 U.S. at 807; Butz v. Economou, 438 U.S. 478, 506–07 (1978); *see also* Scheuer v. Rhodes, 416 U.S. 232, 245–48 (1974).

motions to dismiss or motions for summary judgment.[49] In laying out the summary judgment standard, the Court opined that the trial judge must determine not only the currently applicable law, but also whether that law was clearly established at the time of the alleged constitutional deprivation.[50] If the constitutional or statutory protection was not clearly established at the time of the alleged deprivation, the official will not be liable for failing to anticipate the legal development.[51] If the law was clearly established at the time of the violation, the qualified immunity defense ordinarily will fail, because a public official is expected to know the law governing his or her office.[52] The Supreme Court stated that in a case involving a defense of qualified immunity the determination of the then-existing legal standard presents a threshold question that should be resolved before discovery begins.[53] This threshold inquiry thus includes the determination that the plaintiff has asserted an actual violation of a constitutional right in the first place.[54]

An absolute immunity defense does not require this initial determination. Therefore, the procedural advantage of absolute immunity, the avoidance of civil suit significantly earlier in the legal process, makes it a much more attractive and coveted defense than qualified immunity, which requires, at the very least, an initial response to the claim on its merits. Qualified immunity, like absolute immunity, is an immunity from suit rather than a mere defense, and if either immunity defense is not raised or fails, even erroneously, to forestall trial, then the defense is effectively lost.[55]

## IV. The Historical Development of Prosecutorial Immunity

### A. *Common Law Prosecutorial Immunity*

Under the common law, prosecutors were immune from civil suits for malicious prosecution and defamation.[56] Additionally, they could

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[49] *See Harlow*, 457 U.S. at 808.

[50] *Id.* at 818.

[51] *Id.*

[52] *Id.* at 818–19. The Court recognized the possibility that an official could successfully plead that extraordinary circumstances prevented actual knowledge, or reason to know, of the relevant legal standard. *Id.* at 819.

[53] *See id.* at 818. A court order denying qualified or absolute immunity, such as the denial of a motion for summary judgment, is not subject to the 28 U.S.C. § 1291 finality requirement and is therefore immediately appealable under the collateral order doctrine. Mitchell v. Forsyth, 472 U.S. 511, 530 (1985).

[54] Siegert v. Gilley, 500 U.S. 226, 231 (1991).

[55] *Mitchell*, 472 U.S. at 526.

[56] *See* Burns v. Reed, 500 U.S. 478, 485 (1991).

not be held liable for the knowing use of false or misleading testimony during trial or before a grand jury.[57] In 1896, in *Griffith v. Slinkard*, the Supreme Court of Indiana became the first American court to address the issue of a prosecutor's amenability to civil suit.[58] The plaintiff claimed that without probable cause and after a grand jury had refused to indict, a local prosecutor added the plaintiff's name to the indictment of his alleged co-conspirator, resulting in the plaintiff's arrest.[59] The court dismissed the claim on the ground that the prosecutor was absolutely immune to suit.[60]

The United States Supreme Court considered the issue of prosecutorial immunity for the first time in 1927 in *Yaselli v. Goff*, in which the Court held a prosecutor absolutely immune from civil actions for malicious prosecution where the alleged acts pertained to indictment and prosecution of a criminal case.[61] In *Yaselli*, the plaintiff claimed that a Special Assistant to the United States Attorney General intentionally presented false and misleading evidence to a grand jury to secure his indictment.[62] The criminal case against the plaintiff had ended with a directed verdict against the Government, and the plaintiff sought $300,000 in civil damages for malicious prosecution in the following civil suit.[63] The district court dismissed the complaint, and the United States Court of Appeals for the Second Circuit upheld that decision.[64] The Second Circuit's opinion, affirmed by the Supreme Court, noted that prosecutorial immunity from civil actions for malicious prosecution based on alleged transgressions in the indictment or prosecution phases is "absolute, and is grounded on principles of public policy."[65]

The policy justifications underlying these early grants of absolute immunity varied. Some courts have described prosecutorial immunity as quasi-judicial.[66] Judicial immunity for acts within the judge's jurisdiction can be traced to the early English common law, as can the immunity of grand jurors.[67] These courts reason that judges, grand jurors

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[57] *See id.*

[58] *See* Imbler v. Pachtman, 424 U.S. 409, 421 (1976) (discussing Griffith v. Slinkard, 44 N.E. 1001 (Ind. 1896)).

[59] *Griffith*, 44 N.E. at 1001.

[60] *Id.* at 1002.

[61] 275 U.S. 503 (1927), *aff'g* 12 F.2d 396, 406 (2d Cir. 1926).

[62] Yaselli v. Goff, 12 F.2d 396, 397 (2d Cir. 1926), *aff'd* 275 U.S. 503 (1927).

[63] *Id.* at 398.

[64] *Id.* at 399, 407.

[65] *Id.* at 406.

[66] *See, e.g.*, *id.* at 402, 404; Watts v. Gerking, 228 P. 135, 137 (Cal. 1924).

[67] *See* Floyd v. Barker, 12 Coke 23, 24, 77 Eng. Rep. 1305, 1306 (1608). The United States

and prosecutors all perform the discretionary function of evaluating evidence presented to them.[68] The United States Supreme Court has not adopted the "quasi-judicial" characterization, but has acknowledged that the same major policy considerations underlie both judicial and prosecutorial immunity: concern that meritless litigation could be used to harass the official, distracting that official from his or her primary public purpose; and the potential that the threat of such litigation would influence the independent judgment crucial to the official's public role.[69]

### B. *The Preservation of Common Law Immunities Under § 1983*

There are no immunities explicitly recognized in the language of 42 U.S.C. § 1983, originally passed as section 1 of the Civil Rights Act of 1871.[70] The United States Supreme Court first considered the intent of the Reconstruction Congress with regard to immunities under the forerunner to § 1983 in its 1951 *Tenney v. Brandhove* decision.[71] The Court concluded that the passage of § 1983 was not intended to abrogate immunities that previously had been available to various categories of officials on public policy grounds.[72] In *Tenney*, therefore, because legislators in both the United States and England had enjoyed absolute immunity prior to the enactment of § 1983, members of a state legislative committee were accorded absolute immunity in a § 1983 suit charging that they had called the plaintiff before the committee, in violation of his constitutional rights, to coerce his silence on matters of public concern.[73] The *Tenney* decision established the principle that

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Supreme Court first recognized absolute judicial immunity in *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 351, 354 (1872). *See* Imbler v. Pachtman, 424 U.S. 409, 423 n.20 (1976). For the argument that Congress could not have intended the common law judicial immunity to be preserved under § 1983 because that immunity would not be recognized as the common law until the 1872 decision in *Bradley*, see John C. Filosa, Comment, *Prosecutorial Immunity: No Place for Absolutes*, 1983 U. ILL. L. REV. 977, 981 (1983).

[68] *Imbler*, 424 U.S. at 423 n.20.

[69] *See id.* at 422–23.

[70] *Id.* at 417.

[71] *See* 341 U.S. 367, 376 (1951). In *Tenney*, the Supreme Court considered the immunity of members of the California legislature's "un-American activities" committee to civil suit under the prior § 43 of Title 8, the predecessor to the current § 1983, and held that the Reconstruction Congress did not intend to displace the legislative immunity enshrined in Article I, § 6 of the U.S. Constitution. *Id.* at 369, 376. The *Tenney* Court noted that Congress passed the Reconstruction Act of 1871 without debating or otherwise expressing its intended limits. *Id.* at 376. The Court refused to find an implied or implicit Congressional intent that would override the common law tradition of immunities. *Id.*

[72] *Id.* at 376; *see also Imbler*, 424 U.S. at 418.

[73] *Tenney*, 341 U.S. at 379; *see also Imbler*, 424 U.S. at 418. The Court noted that the official's

§ 1983 will be read as consistent with previously existing tort defenses and immunities.[74]

Since *Tenney*, the United States Supreme Court has preserved a number of common law immunities under § 1983.[75] The United States Supreme Court reaffirmed in 1967 that judges have absolute immunity from § 1983 suits for acts committed within their jurisdiction and judicial function.[76] In that same year, the Supreme Court held that police officers subject to § 1983 suits enjoy a "good faith and probable cause" defense comparable to the common law defense to false arrest.[77] In 1974, the Court held that governors and other state executive officials have a qualified immunity that varies with "the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action."[78] In 1975, the Supreme Court determined that school officials acting in a disciplinarian role have a qualified immunity freeing them from liability under § 1983 so long as they acted without malicious intent to cause a constitutional injury and could not reasonably have known their actions violated students' constitutional rights.[79] Qualified immunity is now determined under the *Harlow* objective standard,[80] but in each of these contexts, the Court examined the nature of the immunity under the common law and recognized essentially the same immunity under § 1983.[81]

The United States Supreme Court has also stated, however, that it will use restraint in extending immunities beyond those found in the common law, even when confronted by compelling policy arguments.[82] The Court has grounded its decisions in the common law and in history because its role is "not to make a freewheeling policy choice," but to attempt to discern the intent of the Reconstruction Congress that enacted the predecessor to § 1983.[83]

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improper purpose would not defeat the immunity, because the immunity is not a reward for the individual's noble action, but only serves the public good. *Tenney*, 341 U.S. at 377.

[74] *Imbler*, 424 U.S. at 418.

[75] *Id.*

[76] *See, e.g.*, Pierson v. Ray, 386 U.S. 547, 553–54 (1967). For the common-law absolute immunity of judges, see *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1872).

[77] *Pierson*, 386 U.S. at 557.

[78] Scheuer v. Rhodes, 416 U.S. 232, 247 (1974). The plaintiffs in *Scheuer* represented the estates of three students killed by members of the National Guard during a student protest at Kent State University in May 1970. *Id.* at 234.

[79] *See* Wood v. Strickland, 420 U.S. 308, 322 (1975).

[80] *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

[81] Imbler v. Pachtman, 424 U.S. 409, 419 (1976).

[82] *See, e.g.*, Buckley v. Fitzsimmons, 509 U.S. 259, 268 (1993); Burns v. Reed, 500 U.S. 478, 486–87 (1991).

[83] Malley v. Briggs, 475 U.S. 335, 342 (1986). The Court has stated: "We do not have a license

### C. *The Supreme Court's Prosecutorial Immunity Doctrine:* Imbler *and* Burns

The United States Supreme Court has specifically addressed the issue of prosecutorial immunity to § 1983 suits only three times.[84] In 1976, in *Imbler v. Pachtman*, the United States Supreme Court held that a state prosecutor has absolute immunity from civil suit under § 1983 for any act within the scope of his or her duties in initiating a criminal prosecution and presenting the criminal case.[85] In *Imbler*, Paul Imbler filed a § 1983 suit claiming that the district attorney had presented false testimony and suppressed evidence concerning the testimony of a fingerprint expert during Imbler's murder trial.[86] The Court drew upon the absolute immunity from malicious prosecution suits at common law and reasoned that such a rule would prevent harassment suits from burdening both the prosecutor and the criminal justice system.[87] Thus, the Court held the district attorney absolutely immune from suit for his actions in initiating and presenting the murder case.[88]

Imbler was convicted of first-degree felony murder for the 1961 shooting of a Los Angeles market manager.[89] The jury fixed his sentence at death.[90] The Supreme Court of California upheld his conviction in a 1962 decision, but shortly thereafter, Deputy District Attorney Richard Pachtman, the prosecutor at Imbler's trial, informed the Governor of California that following trial he and a state correctional authority investigator had discovered new evidence relating to the case.[91] They had discovered witnesses who could corroborate Imbler's alibi, his primary defense at trial, and some additional information discrediting the trustworthiness of the prosecution's main identification witness, Alfred Costello, who had been passing by on the night of the shooting and claimed to have two clear views of Imbler.[92] Imbler filed a state habeas corpus petition, and the Supreme Court of Califor-

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to establish immunities from § 1983 actions in the interests of what we judge to be sound public policy." Tower v. Glover, 467 U.S. 914, 922–23 (1984).

[84] *See Buckley*, 509 U.S. at 269; *Burns*, 500 U.S. at 478; *Imbler*, 424 U.S. at 409. The Supreme Court also considered the issue of prosecutorial immunity in a non-§ 1983 context in Yaselli v. Goff, 275 U.S. 503 (1927), *aff'g* 12 F.2d 396 (2d Cir. 1926). For a discussion of *Yaselli*, see *supra* notes 61–65 and accompanying text.

[85] *Imbler*, 424 U.S. at 431.

[86] *Id.* at 416.

[87] *See id.* at 420, 425–26.

[88] *Id.* at 431.

[89] *Id.* at 411–12.

[90] *Imbler*, 424 U.S. at 412.

[91] *Id.* The letter was dated August 17, 1962, and Imbler's execution, scheduled for September 12, 1962, was later stayed. *Id.* at 413 n.5.

[92] *Id.* at 411, 413.

nia appointed one of its retired justices to act as referee.[93] During the referee's hearing Costello retracted his trial identification of Imbler and revealed that he had embellished testimony relating to his own background.[94] Imbler's counsel praised Pachtman's post-trial investigation, but claimed that the prosecution had knowingly used false testimony and suppressed material evidence at trial.[95] In 1963, the Supreme Court of California denied the writ, citing the referee's findings that Costello's retraction at the habeas hearing was less credible than his original trial identification and that Imbler's corroborating witnesses had been impeached.[96] In late 1967 or early 1968, Imbler filed a federal habeas corpus petition based on the same arguments rejected in his state habeas hearing.[97] The federal district court found eight instances of state misconduct in the record of Imbler's original trial.[98] Six consisted of the prosecution's use of misleading or false testimony by Costello, and the other two were suppressions of evidence favorable to Imbler by a fingerprint expert.[99] The court ordered that the writ would issue if Imbler was not retried within sixty days.[100] When the Court of Appeals for the Ninth Circuit affirmed the district court's decision, the State of California chose not to retry Imbler and he was subsequently released.[101]

In 1972, Imbler filed a civil rights action under 42 U.S.C. § 1983 against Pachtman, the police fingerprint expert and various other Los Angeles law enforcement officers claiming a conspiracy to unlawfully charge and convict him and seeking $2.7 million from each defendant plus attorney's fees.[102] With regard to Pachtman, Imbler claimed that the prosecutor had "with intent, and on other occasions with negligence" allowed Costello to give false testimony and that the suppression of evidence by the fingerprint expert was chargeable to Pachtman under federal law.[103] Imbler also claimed that Pachtman initiated the

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[93] *Id.* at 413.

[94] *Id.*

[95] *Imbler*, 424 U.S. at 413.

[96] *Id.* at 413–14. The following year, Imbler's death sentence was overturned on other grounds and the State stipulated to life imprisonment. *Id.* at 414.

[97] *Id.* at 414.

[98] *Id.*

[99] *Id.* at 414–15. The district court found Costello had given misleading and ambiguous testimony and had lied about his criminal record, education and current income. *Id.* at 414 n.8. The court found that either Pachtman or a police officer in the courtroom knew that the misleading testimony was misleading, and that Pachtman had reason to suspect that the false testimony was indeed false. *Id.*

[100] *Imbler*, 424 U.S. at 415.

[101] *Id.*

[102] *Id.* at 415–16.

[103] *Id.* at 416.

prosecution knowing that Imbler had passed a lie detector test and that Pachtman had altered a police artist's sketch of the killer to resemble Imbler once the investigation had focused on him.[104] The district court found that Pachtman was immune from civil liability for these alleged acts and dismissed the complaint as to him.[105] That court described the alleged acts as prosecutorial activities integral to the judicial process.[106]

The United States Supreme Court granted certiorari to consider for the first time whether a state prosecuting attorney, acting within the scope of his or her duties in initiating and conducting a criminal prosecution, could be sued under § 1983.[107] The *Imbler* Court acknowledged the numerous decisions by federal courts of appeals recognizing absolute prosecutorial immunity from § 1983 suits and reaffirmed that the proper inquiry focuses on the immunity granted to the prosecutor at common law and the policies historically underlying that grant of immunity.[108] The Court held that the same policy considerations underlying the common law rule of prosecutorial immunity from malicious prosecution suits supported preserving that immunity as a defense to § 1983 claims.[109]

The *Imbler* Court noted that if a prosecutor had only a qualified immunity, the burden of meeting that standard would not only undermine the performance of his or her public duties, but would actually impose a greater burden than the same standard applied to other executive or administrative officials.[110] The Court stated that the types of prosecutorial activities that are most susceptible to civil suit are "typical of issues with which judges struggle in actions for post-trial relief, sometimes to differing conclusions."[111] The Court stated that a post-trial examination of the prosecutor's knowledge of witnesses' untruthfulness or misrepresentation of facts, the prosecutor's failure to disclose material evidence, or the propriety of opening and closing statements would involve "a virtual retrial" of the crime and the submission of legally technical issues to a lay jury.[112] The Court reasoned that because the prosecutor's workload requires myriad decisions that could give rise to tenable constitutional claims, not only would an

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[104] *Id.*

[105] *Imbler*, 424 U.S. at 416.

[106] *Id.* at 416–17.

[107] *Id.* at 410.

[108] *See id.* at 420–21. For a sampling of circuit decisions acknowledging absolute § 1983 immunity for prosecutors, see *id.* at 420 n.16.

[109] *Id.* at 424; *see supra* notes 66–69 and accompanying text.

[110] *Imbler*, 424 U.S. at 425.

[111] *Id.*

[112] *Id.*

accused prosecutor be distracted from his primary duty of law enforcement, but defending such claims, often years after alleged acts took place, would also impose "intolerable burdens" upon both the prosecutor and the criminal justice system.[113]

The Supreme Court noted that the proper functioning of the criminal justice system requires that the prosecutor have broad discretion in presenting the government's case.[114] Knowledge of possible personal liability in post-trial civil suits might prompt the prosecutor to resolve doubts about witnesses or evidence in such a way that would deny the trier of fact potentially relevant evidence, or avoid trial entirely.[115] Where the prosecutor believes that acquittal is a significant possibility, he or she might abandon the case, when the proper course of action would be to let a jury make the determination.[116]

The Court suggested, furthermore, that the decisions of judges reviewing petitions for pre-conviction or post-conviction relief at the original trial—in appellate review or in state or federal habeas corpus reviews—might be colored by the knowledge that a finding of prosecutorial misconduct could result in the prosecutor's civil liability.[117] The Court also suggested that not only might the judge be consciously or subconsciously influenced during a post-trial review of alleged prosecutorial misconduct, but also the prosecutor might question his or her continuing ethical duty to inform the court of any material evidence suggestive of innocence or mitigation that might be uncovered following the trial.[118] The Court reasoned that although the decision to exercise this post-trial disclosure duty is already influenced by the knowledge that after-acquired evidence could overturn a prior conviction, a qualified immunity would certainly lessen the prosecutor's incentive to comply with the ethical imperative.[119]

The Supreme Court thus held that in initiating a prosecution and presenting the case, undeniably advocatory functions, the prosecutor enjoys absolute immunity from civil suit under § 1983.[120] The Court

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[113] *Id.* at 425–26.

[114] *Id.* at 426. The *Imbler* Court acknowledged that its decision balanced the rights of a genuinely wronged defendant against the public interest in criminal justice in favor of the latter, but suggested the continuing viability of criminal charges and professional sanctions to deter, if not remedy, willful constitutional violations. *Id.* at 427–28, 428–29.

[115] *Imbler*, 424 U.S. at 426.

[116] *Id.* at 426 n.24.

[117] *Id.* at 427.

[118] *Id.* at 427 n.25; *see also, e.g.*, MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7–103 (1983); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8 (1990).

[119] *See Imbler*, 424 U.S. at 427 n.25.

[120] *Id.* at 430–31. Justice White, in a concurring opinion, agreed that the knowing use of false

explicitly recognized certain prosecutorial functions as advocatory: the decisions whether to present a case to the grand jury and whether to file an information, whether and when to initiate a prosecution, whether to dismiss an indictment, which witnesses to present, and the "obtaining, reviewing, and evaluating of evidence."[121] The Court rested its holding on public policy grounds, noting that any lesser protection would place intolerable burdens on the prosecutorial law enforcement function and the entire criminal justice system.[122] The *Imbler* Court indicated the boundaries of its decision by expressly reserving the issue of what type of immunity would be accorded non-advocatory prosecutorial acts, such as activities that the prosecutor conducted in the role of investigator or administrator.[123]

In 1991, in *Burns v. Reed*, the United States Supreme Court revisited the issue of prosecutorial immunity to answer the question reserved in *Imbler*: what level of immunity should be accorded a prosecutor for non-advocatory acts.[124] The Court held that only qualified immunity is available to prosecutors engaging in non-advocatory functions.[125] *Burns* involved a § 1983 suit that alleged that a state prosecutor had violated the plaintiff's constitutional rights by advising police on the use of hypnosis and on the sufficiency of their probable cause to arrest, and by withholding certain evidence at a subsequent search warrant probable cause hearing.[126] The Court reasoned that the policies underlying absolute immunity, freeing the prosecutor from threats of unfounded litigation and the system from the burden of disposing of such suits, only extend to acts of an advocatory nature, not to

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or perjured testimony should receive absolute immunity, but found no common law basis or policy justification for extending absolute immunity beyond the prosecutor's initiation and presentation of the case. *Id.* at 433–34, 440–42 (White, J., concurring). Thus he would not grant absolute immunity for an alleged failure to disclose material or exculpatory evidence. *Id.* at 441 (White, J., concurring). White, recognizing the need to affirmatively encourage disclosure where the judicial process often will not discover or remedy the withholding of material evidence, reasoned that immunity doctrine should, and does, only reward the *presentation* of testimony or other evidence, and not its suppression. *See id.* at 442–43 (White, J., concurring).

[121] *Id.* at 431 n.33.

[122] *See id.* at 425–26. In 1977, Congress considered adding a subsection (e) to § 1983 that would have made a prosecutor personally liable for actions or omissions *in the course of the prosecution*, if the prosecutor violated (or would have violated had there been a conviction) a criminal defendant's Fifth or Fourteenth Amendment due process rights or otherwise suppressed or destroyed evidence. *See* S. 35, 95th Cong., 1st Sess. (amend. 1426, Oct. 6, 1977). The proposed amendment was highly criticized in committee hearings, especially by representatives of state prosecutors' offices, and never passed. *See* Filosa, *supra* note 67, at 990.

[123] *Imbler*, 424 U.S. at 430–31.

[124] *See Burns*, 500 U.S. 478, 481 (1991).

[125] *Id.* at 496.

[126] *Id.* at 482–83.

investigative or administrative functions.[127] Thus, the Court held the prosecutor absolutely immune from suit for his advocatory participation in the probable cause hearing, but granted only qualified immunity for his investigatory acts of advising the police.[128]

In *Burns*, Cathy Burns filed a § 1983 claim in federal court, against police officers and the state prosecutor, claiming they had violated her Fourth, Fifth and Fourteenth Amendment rights during pre-trial investigation and hearings relating to a 1982 shooting incident.[129] Burns, who was a suspect in the 1982 shooting of her two sons, claimed that the prosecutor advised the investigating officers of the permissibility of hypnosis as an investigative technique.[130] When Burns made seemingly incriminating statements under hypnosis, the prosecutor advised the officers that they most likely had probable cause to arrest her.[131] At a search warrant probable cause hearing following her arrest, the prosecutor failed to inform the judge that the confession was made under hypnosis or that Burns had otherwise consistently denied committing the crime, omissions that Burns characterized as suborning false testimony designed to deliberately mislead the court.[132] At the close of Burns's case, the district court hearing the § 1983 claim granted the prosecutor's motion for a directed verdict pursuant to Federal Rule of Civil Procedure 50, finding him absolutely immune from liability for his prosecutorial conduct, and the United States Court of Appeals for the Seventh Circuit affirmed on the same grounds.[133] The United States Supreme Court granted certiorari to resolve the circuit split over the proper method of distinguishing protected advocatory acts and unprotected administrative or investigatory acts.[134]

The Supreme Court held that a prosecutor enjoys absolute immunity from liability for participation in a pre-trial probable cause hear-

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[127] *Id.* at 490–91, 494.

[128] *Id.* at 487, 496.

[129] 500 U.S. at 481, 483.

[130] *Id.* at 481–82.

[131] *Id.* at 482. The police suspected Burns might have multiple personalities, one of which committed the crime. *Id.* Following four months of observation at a state hospital it was determined that she did not in fact have multiple personalities, and she was released. *Id.* at 482 n.1.

[132] *Id.* at 482–83, 487–88. Burns was charged with attempted murder, but when her motion to suppress the statements made under hypnosis was granted, the prosecution dropped all charges. *Id.* at 483.

[133] *Id.*

[134] *Burns*, 500 U.S. at 483. After the *Imbler* decision, most of the circuits denied absolute immunity for investigative and administrative acts, but the circuits differed as to which acts fell into those categories. *Id.* at 483 n.2. The *Burns* Court noted in particular the circuit split over whether absolute immunity should or should not extend to the prosecutorial act of giving legal advice to police. *Id.*

ing.[135] The Court noted that at common law, witnesses, lawyers and prosecutors had absolute immunity from liability for false or defamatory statements made during judicial proceedings, and that attorneys, including prosecutors, had absolute immunity for eliciting false or defamatory testimony.[136] Finally, the Court adopted the same policy justifications established in *Imbler v. Pachtman*, noting that appearance at a probable cause hearing is clearly an advocatory function "intimately associated with the judicial phase of the criminal process," as well as a function connected with the initiation of a prosecution.[137]

Yet, the *Burns* Court held further that when a prosecutor provides legal advice to the police, or to other investigating officials, the prosecutor enjoys only qualified immunity.[138] The Court noted the absence of any historical or common law tradition of extending absolute immunity to this prosecutorial function.[139] Absent a tradition of absolute immunity, and without a clear intimate connection to the judicial phase of the criminal process, the Court declined to extend the absolute immunity.[140] The Court also reasoned that the major policy consideration underlying absolute prosecutorial immunity—the risk of harassing litigation—is not present where a suspect would most likely be unaware of the prosecutor's advice to the police.[141] The Court also pointed out that it would be incongruous to grant prosecutors absolute immunity for giving advice to police while holding the police to a qualified immunity standard for accepting and acting on that advice.[142]

The Court took the position that in order to make a useful distinction between investigatory and advocatory functions, courts would have to determine the act's connection to the judicial process.[143] Otherwise *any* pre-indictment prosecutorial act could be characterized as related, however tenuously, to the prosecutor's decision to initiate a criminal proceeding and could thereby share in the absolute protec-

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[135] *Id.* at 487. The Court carefully noted that Burns's claim did not question the prosecutor's motivation for seeking the warrant or any acts outside of the hearing courtroom. *Id.*

[136] *Id.* at 489–90.

[137] *Id.* at 490–91, 492 (quoting *Imbler*, 424 U.S. at 430). The judge before whom the probable cause hearing was held testified that in her court only a prosecuting attorney could seek a warrant or authorize a warrant application, whereas police officers could not go directly to the court to obtain a warrant. *Id.* at 491 n.7.

[138] *Id.* at 496.

[139] *Burns*, 500 U.S. at 492.

[140] *Id.* at 493.

[141] *Id.* at 494.

[142] *Id.* at 495. The Court also noted that since its decision in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), qualified immunity provides greater, and therefore sufficient, protection for certain official acts. *Burns*, 500 U.S. at 494 n.8.

[143] *Id.* at 495.

tion accorded to that decision.[144] The Court did not, however, fully discuss just how courts should go about characterizing and categorizing various prosecutorial functions as advocatory, administrative or investigatory acts. The *Burns* Court simply established that prosecutors will have absolute immunity only for advocatory acts closely associated with the judicial process, and they will have only qualified immunity for administrative and investigatory acts, such as giving advice to the police.[145]

### D. *The Supreme Court's Prosecutorial Immunity Doctrine:* Buckley v. Fitzsimmons

In 1993, in *Buckley v. Fitzsimmons*, the United States Supreme Court offered further clarification by considering what level of immunity should be accorded to prosecutorial acts during preliminary investigations and prosecutors' statements to the media.[146] The Supreme Court held that neither function was protected by absolute immunity.[147] *Buckley* involved a § 1983 claim alleging that a state prosecutor had elicited a fabricated expert opinion and made false statements to the media linking the plaintiff to the crime prior to his murder indictment.[148] The Court reasoned that neither function enjoyed absolute immunity at common law and neither triggered the policy concerns for burdening the criminal justice system.[149] Thus, the Court held that the prosecutor enjoyed only qualified immunity for the alleged acts.[150]

In *Buckley*, Stephen Buckley filed a § 1983 suit against seventeen defendants, including Michael Fitzsimmons, the elected Illinois county state's attorney, the assistant state's attorney who prosecuted Buckley's case and two assistant prosecutors also assigned to the case, claiming that the prosecutors fabricated evidence and that Fitzsimmons made false statements in a press conference announcing Buckley's arrest and

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[144] *Id.*

[145] *Id.* at 493. Justice Scalia wrote a separate opinion, concurring in part and dissenting in part. *Id.* at 496 (Scalia, J., concurring in part and dissenting in part). Scalia agreed with the majority's determinations of immunity, but would have considered the prosecutor's institution of the search warrant hearing as a possible independent constitutional violation under § 1983. *Id.* at 496–97 (Scalia, J., concurring in part and dissenting in part). In accordance with the common law, Scalia would find this initiation of warrant proceedings entitled to only qualified immunity. *Id.* at 497. (Scalia, J., concurring in part and dissenting in part).

[146] *See* 509 U.S. 259, 261 (1993).

[147] *See id.* at 273–74, 277–78 (White, J., concurring).

[148] *Id.* at 262–64.

[149] *Id.* at 274 n.5, 275–79 (White, J., concurring).

[150] *Id.* at 273, 278 (White, J., concurring).

indictment just twelve days before the primary election.[151] Buckley claimed that after three experts failed to match a bootprint left on the victim's door to boots supplied by Buckley, the prosecutors sought the opinion of a North Carolina anthropologist known for her willingness to fabricate unfounded expert testimony.[152] At the time these expert opinions were being gathered, the murder investigation was being conducted jointly by the sheriff's department and Fitzsimmons's prosecutors.[153] Buckley was indicted, arrested and held in jail for the ten months preceding his trial, unable to meet his bond.[154] A mistrial was declared when the jury failed to reach a verdict, and Buckley remained in jail for two more years, during which time a third party confessed to the murder.[155] It was only after the bootprint expert witness died that the state's attorney dropped all charges, Buckley was released and the § 1983 suit was filed.[156]

The district court hearing Buckley's § 1983 claim ruled that the prosecutors had absolute immunity from the claim arising out of the alleged fabrication of evidence, but that Fitzsimmons was not absolutely immune from liability for his comments at the press conference.[157] The Court of Appeals for the Seventh Circuit held that the prosecutors had absolute immunity on both claims.[158] A unanimous Supreme Court held that Fitzsimmons's statements to the media were

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[151] *Buckley*, 509 U.S. at 261–62. Buckley was charged in the highly publicized 1983 rape and murder of an eleven-year-old girl and claimed that the press conference resulted in an even more "inflamed" and prejudicial atmosphere which affected the fundamental fairness of his trial. *Id.* Buckley argued that the intense publicity and public pressure to solve the crime, heightened in Fitzsimmons's case by the upcoming election, motivated the prosecutors' actions. *Id.*

[152] *Id.* at 262.

[153] *Id.*

[154] *Id.* at 264.

[155] *Id.* The State's case consisted mainly of the testimony of the North Carolina anthropologist, who claimed that the print at the scene positively identified Buckley. *Id.* at 262.

[156] *Buckley*, 509 U.S. at 264.

[157] *Id.* The district court characterized the alleged fabrication of bootprint evidence as comparable to the collection or evaluation of evidence leading up to the initiation of prosecution, a protected function. *See id.* at 264–65. The Seventh Circuit took a novel approach and held that where the constitutional injury occurs contemporaneous to the criminal proceeding, so that it in effect only affects the continuation of the case, then the prosecutor will have absolute immunity and the injured party can only seek a remedy cutting short or mitigating the criminal prosecution. *Id.* at 265. In the view of the Seventh Circuit, the accused official has a qualified immunity only where the constitutional injury is complete before the initiation of criminal proceedings. *Id.* The Supreme Court granted certiorari and remanded *Buckley* to be reconsidered in light of the intervening decision in *Burns v. Reed*, but the Seventh Circuit reaffirmed its decision. *Buckley*, 509 U.S. at 266. In *Buckley*, the Supreme Court criticized the Seventh Circuit for focusing not on the nature of the conduct for which immunity is claimed, but on the harm it may have caused within, or in the absence of, criminal proceedings. *See id.* at 271.

[158] *Buckley*, 509 U.S. at 265.

non-advocatory and, hence, not entitled to absolute immunity.[159] A five-to-four majority held that the alleged conspiracy to manufacture false evidence was not advocatory and therefore not deserving of absolute immunity.[160]

On the issue of Fitzsimmons's liability for his statements to the press, the Supreme Court noted that no absolute immunity existed at common law for a prosecutor's out-of-court statements to the press.[161] The common law immunity for defamatory statements was limited to statements made in, and relevant to, judicial proceedings.[162] Under the functional approach set out in *Imbler*, the *Buckley* Court found no functional connection between comments to the media and either Fitzsimmons's role as advocate or the judicial process itself.[163]

In addressing the issue of the prosecutor's fabrication of evidence during the murder investigation, the *Buckley* Court implied that the line between absolute and qualified immunity will not be drawn temporally so that any advocatory act following initiation of proceedings would be absolutely protected, while any pre-initiation act would have only qualified protection.[164] Instead, the Court, citing *Imbler*, expressly recognized that some acts prior to the initiation of criminal process and outside the courtroom will be accorded absolute immunity.[165] The Court stated that the crucial characterization is whether the function in question was advocatory or non-advocatory.[166] The Court concluded that when a prosecutor conducts administrative acts or performs investigatory functions that do not relate to the advocatory preparation for the initiation of prosecution or for trial itself, the prosecutor will receive only qualified immunity.[167] But, according to the Court, when

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[159] *See id.* at 277. The Court noted that it was not considering the issue of whether the prosecutors would have qualified immunity, but *Burns* and other cases have recognized a presumption of qualified immunity for government officials. *See Buckley*, 509 U.S. at 261; Burns v. Reed, 500 U.S. 478, 486–87 (1991).

[160] *Buckley*, 509 U.S. at 272, 282. The Chief Justice, Justice White and Justice Souter joined Justice Kennedy in his dissent. *Id.* at 282 (Kennedy, J., concurring in part and dissenting in part).

[161] *Id.* at 277. Buckley claimed that Fitzsimmons made false statements concerning the bootprint evidence, released Buckley's mug shot to the media and otherwise linked Buckley to a burglary ring which supposedly committed the murder, all of which inflamed and prejudiced the public, depriving him of his right to a fair trial. *Id.* at 276–77.

[162] *Id.* at 277.

[163] *Buckley*, 509 U.S. at 277–78. Simply stated, "The conduct of a press conference does not involve the initiation of a prosecution, the presentation of the state's case in court, or actions preparatory for these functions." *Id.* at 278.

[164] *See id.* at 272–73.

[165] *Id.* at 272.

[166] *Id.* at 272–73.

[167] *See id.* at 273.

a prosecutor acts in an advocatory capacity in preparation for the initiation of prosecution or for trial itself, the prosecutor will have absolute immunity.[168] Such pre-initiation, pre-trial protected acts include the professional evaluation of evidence collected by law enforcement officials and the preparation of that evidence for presentation at trial, including interviewing of witnesses.[169] The proper inquiry, according to the *Buckley* Court, focuses on whether the prosecutor was acting in his capacity as advocate or in a capacity comparable to a law enforcement officer investigating the crime.[170]

The *Buckley* Court concluded its analysis by establishing a seemingly bright-line rule: a prosecutor does not function as an advocate prior to the existence of probable cause to arrest and hence will not receive absolute immunity for acts done prior to the establishment of probable cause.[171] The Court observed that the existence of probable cause does not ensure absolute immunity, for example where non-advocatory acts are performed after the initiation of prosecution.[172] Yet the *Buckley* rule, drawn out to its logical conclusion, forecloses courts' consideration of the nature of pre-probable cause prosecutorial activities on a case-by-case basis.[173] Applying its analysis of the law to the facts in *Buckley*, the Court stressed that the prosecutors' alleged manipulation of the bootprint evidence occurred at an early stage in the investigatory process, well before probable cause existed.[174] The Court noted that the special grand jury had not yet been impaneled, and even when impaneled, it functioned only as an investigatory body for the ten months leading up to Buckley's indictment.[175] The Court concluded that the fact that an indictment is returned at some point following the alleged prosecutorial misconduct cannot retroactively transform the nature of the alleged acts from administrative or investigatory to advocatory.[176] Otherwise, the Court reasoned, a prosecutor could shield himself or herself from liability simply by making certain the case was brought to trial.[177] The *Buckley* Court stated that the prosecutorial act

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[168] *Buckley*, 509 U.S. at 273.

[169] *Id.*

[170] *See id.*

[171] *See id.* at 274. The Court again noted that no analogous absolute immunity existed at common law for fabrication of evidence at the preliminary investigation stage. *Id.* at 274–76.

[172] *See id.* at 274 & n.5.

[173] *See Buckley*, 509 U.S. at 274 & n.5.

[174] *Id.* at 274–75.

[175] *Id.* at 275.

[176] *Id.* at 275–76.

[177] *Id.* at 276. Justice Kennedy agreed with this reasoning, but suggested that "declining to institute a prosecution likewise should not 'retroactively transform' work from the prosecutorial

must be characterized according to its nature at the time it was performed.[178] The Court held, therefore, that no prosecutorial act occurring prior to the existence of probable cause to arrest can be considered advocatory, and consequently the prosecutor may only assert qualified immunity for those pre-probable cause activities.[179]

Justice Kennedy wrote a separate opinion, joined by three other justices, agreeing that statements to the press are entitled to only qualified immunity, but rejecting the majority's bright-line rule.[180] Justice Kennedy stated that he would trust federal courts to apply the *Imbler* functional test and weed out those instances where prosecutors disguised administrative or investigatory acts as early acts of advocacy.[181] Justice Kennedy would therefore find absolute immunity for truly advocatory acts, such as the manipulation of expert testimony, even if they occurred during the investigatory, pre-probable cause stage.[182] Kennedy expressed concern that denying absolute immunity prior to probable cause would effectively destroy immunity protections, because plaintiffs could simply reframe their claims to cite the preparation leading to the alleged acts, thereby defeating the prosecutor's absolute immunity defense.[183] Kennedy stated, furthermore, that where absolute immunity shields the decision to use evidence at trial, it should also shield the "steps leading to that decision," especially because the ultimate constitutional harm occurs during, and can therefore be remedied at, the criminal trial itself.[184]

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into the administrative," by automatically reducing the immunity available prior to that initiation. *Id.* at 289–90 (Kennedy, J., concurring in part and dissenting in part).

[178] *See Buckley*, 509 U.S. at 274–75.

[179] *See id.* Justice Scalia wrote a separate opinion concurring in the judgment and the opinion and approving of the bright-line pre-probable cause rule. *See id.* at 279–80 (Scalia, J., concurring). Scalia questioned, however, the historical validity, or common law bases, of the *generalization* that advocatory acts are entitled to absolute immunity, suggesting instead a more specific and detailed inquiry into common law immunity doctrine and its justifications. *Id.* at 280–81 (Scalia, J., concurring). Scalia also pointed out that the apparent vagueness in the functional approach is diminished in practice, where each defendant bears the burden of proving an analogous common-law immunity for each act in question. *Id.* at 281 (Scalia, J., concurring). Scalia noted that where the common law basis is unclear, the defendant's immunity defense should simply fail. *Id.* (Scalia, J., concurring).

[180] *Id.* at 282, 285–88 (Kennedy, J., concurring in part and dissenting in part).

[181] *Id.* at 289–90 (Kennedy, J., concurring in part and dissenting in part).

[182] *See id.* at 286–88 (Kennedy, J., concurring in part and dissenting in part).

[183] *See Buckley*, 283–85 (Kennedy, J., concurring in part and dissenting in part).

[184] *See id.* at 274 (Kennedy, J., concurring in part and dissenting in part).

## V. Uncertainties in the Law of Prosecutorial Immunity After *Buckley*

### A. *Potential Complication of the Investigative vs. Advocatory Characterization*

Although the Supreme Court's attempt to establish a bright-line rule in *Buckley* may be seen as a small victory for individual rights, the Supreme Court has still provided no precise guidelines for determining whether a prosecutorial act following the establishment of probable cause to arrest is administrative or investigatory, or whether it is advocatory.[185] Some commentators have read *Buckley* as creating a presumptive categorization of post-probable cause acts as advocatory and hence deserving of absolute immunity.[186] This conclusion is unfounded. The majority in *Buckley* explicitly states that probable cause to arrest is a necessary, but not a sufficient, condition for advocatory categorization.[187] The *Buckley* holding continues to call for a further determination of whether a post-probable cause act was investigatory or advocatory, presumably based on whatever guidance can be gleaned from *Imbler*, *Burns* and *Buckley*.[188]

But the *Buckley* decision might be viewed as undermining the Court's previous functional approach to determining prosecutorial immunity. *Buckley* states that no prosecutorial act is advocatory *prior* to the time the prosecutor has probable cause *to arrest*.[189] The *Burns* Court granted absolute immunity for appearing at a *search warrant* probable-cause hearing *following* arrest.[190] Yet the *Buckley* Court ultimately justifies its bright-line rule by relying on the absence of a common law absolute

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[185] *See id.* at 261. It has been well argued that *Buckley* will have a negative impact on the prosecutorial function, and indeed criminal justice, especially at the federal level, where the prosecutor's early and continued involvement in building often complex cases is seen as crucial. *See, e.g.*, Barrow, *supra* note 3, at 324–26. To amass probable cause to arrest for a highly technical white collar offense or criminal conspiracy, for example, may require the prosecutor's participation in the investigatory process to some extent. *See id.* at 324. It is unclear to what extent *Buckley* has or will discourage such early prosecutorial involvement. The Supreme Court's response would likely be that the modern qualified immunity doctrine provides sufficient protection for the innocent prosecutor. *See* Burns v. Reed, 500 U.S. 478, 494–95 (1991).

[186] *See, e.g.*, Jefferey J. McKenna, Note, *Prosecutorial Immunity:* Imbler, Burns, *and Now* Buckley v. Fitzsimmons — *The Supreme Court's Attempt to Provide Guidance in a Difficult Area*, 3 B.Y.U. L. Rev. 663, 691 (1994).

[187] *Buckley*, 509 U.S. at 274 n.5.

[188] *See id.*

[189] *Id.* at 274.

[190] *Burns*, 500 U.S. at 492.

immunity for pre-probable cause prosecutorial activities, giving little effect to the functional analysis called for in *Imbler* and *Burns*.[191] The Court discusses the *Imbler* functional test and then leaps directly to the conclusion that the act was investigative simply because it occurred prior to probable cause to arrest, with no explanation of the analytical process by which this conclusion was, or should be, reached.[192]

*Imbler* and *Burns* made it clear that the crucial determination would be whether the function was administrative or investigative, or whether it was advocatory.[193] *Buckley* makes it clear that this is no longer always the test.[194] Prior to *Buckley*, courts could find acts occurring before probable cause to arrest, such as the evaluation of evidence, to be advocatory in the classic sense.[195] The *Buckley* decision introduces a new and sharp distinction between the advocatory evaluation and preparation of evidence for use at trial and the non-advocatory collection of evidence to support probable cause to arrest, a distinction the Court would determine with reference to the existence or non-existence of probable cause.[196] Yet it is possible to imagine a prosecutor thinking in terms of the potential usefulness of certain evidence at trial or pre-trial hearings after a suspect has been designated but before probable cause has been amassed. It is especially easy to imagine such a prosecutorial function on the federal level, where many prosecutions involve highly complex cases built over lengthy periods.[197]

The *Buckley* Court presumably established the bright-line rule to ease the reviewing court's task of determining the prosecutor's actual motivation in individual cases.[198] It is not clear, however, that the rule will produce the correct result more often than not. Justice Kennedy points out that one of the majority's reasons for the bright-line rule—to ensure that prosecutors receive no greater protection than that awarded to police engaged in the same investigatory acts—falsely assumes that, prior to probable cause, prosecutors and investigators always perform identical functions.[199] As Kennedy points out, police and prosecutors

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[191] *See Buckley*, 509 U.S. at 274 n.5.

[192] *See id.* at 273–74.

[193] *See Burns*, 500 U.S. at 486; *Imbler*, 424 U.S. at 430–31.

[194] *See Buckley*, 509 U.S. at 273–74 (stating bright-line rule that prosecutor does not function as advocate prior to probable cause to arrest).

[195] *See id.* at 287 (Kennedy, J., concurring in part and dissenting in part).

[196] *See id.* at 274.

[197] *See, e.g., id.* at 290–91 (Kennedy, J., concurring in part and dissenting in part) (recognizing situation in which prosecutor may act as advocate prior to probable cause to arrest); Barrow, *supra* note 3, at 325.

[198] *See Buckley*, 509 U.S. at 273–74.

[199] *Id.* at 288 (Kennedy, J., concurring in part and dissenting in part).

may engage in an identical act, but for different purposes, as when the police evaluate evidence to determine if there is probable cause to arrest a suspect, and the prosecutor does so to determine if it will be of use or persuasive at trial.[200] Thus, reliance on the *Buckley* Court's bright-line rule may produce correct results less often than individualized consideration and determination of the nature of the prosecutorial acts prior to the establishment of probable cause.

If *Buckley* tells us that some acts, otherwise considered advocatory, are rendered non-advocatory by the point in time at which they are performed, then to some extent the *Imbler-Burns* "intimate association with the judicial phase of the criminal process" test has been undermined.[201] Implicit in the pre-*Buckley* advocatory-non-advocatory formulation was the notion that immunity is granted according to particular functions and not according to either the official's office or the point in the judicial process at which the act occurs.[202] In laying down a temporal distinction over the pre-existing functional distinction, the Court to some extent confuses the status of the law.[203] In his separate opinion, Justice Kennedy pointed out that prior to *Buckley* it was virtually unquestioned that absolute immunity extended to prosecutorial acts which could form the basis of a common law malicious prosecution suit, even though a central part of a malicious prosecution claim is the allegation that the prosecutor acted without probable cause.[204] The majority rule therefore seems to bar the absolute immunity defense in a malicious prosecution-type claim, formerly the quintessential case for absolute immunity, as long as a plaintiff's pleadings include allegations of harm arising from some actions taken prior to a finding of probable cause.[205] Thus, although the ultimate characterization of the particular function in question in *Buckley* as investigative may be a reasonable determination, the Court's final pronouncement that prior to probable cause a prosecutor does not act as an advocate has a weak basis in the Supreme Court's prior prosecutorial immunity caselaw.[206]

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[200] *Id.* (Kennedy, J., concurring in part and dissenting in part).

[201] *Imbler*, 424 U.S. at 430.

[202] *See Burns*, 500 U.S. at 486; *Imbler*, 424 U.S. at 430–31.

[203] *See* Barrow, *supra* note 3, at 324–25 ("[I]t stands to reason that a prosecutor's observations and evaluations are no different pre-probable cause than after probable cause. . . . [T]here is virtually no reason for the level of immunity to fluctuate on such a mere temporal basis.").

[204] *Buckley*, 509 U.S. at 286 (Kennedy, J., concurring in part and dissenting in part).

[205] *Id.* (Kennedy, J., concurring in part and dissenting in part). Justice Kennedy commented, "I find it rather strange that the classic case for the invocation of absolute immunity falls on the unprotected side of the Court's new dividing line." *Id.* (Kennedy, J., concurring in part and dissenting in part).

[206] *See id.* (Kennedy, J., concurring in part and dissenting in part).

The *Buckley* decision leaves unsettled to what extent reference to the timing of an alleged prosecutorial act will affect its characterization as advocatory or non-advocatory.

### B. *Problems with the* Buckley *"Bright Line" Rule*

*Buckley* held that a prosecutor is not, nor should consider himself to be, an advocate before "he has" probable cause to have anyone arrested.[207] Assuming that the Supreme Court intended this statement to be interpreted literally, the Court provides no useful indication of at what point probable cause will be "had" or who is to determine its existence. The Supreme Court offers one hint by noting that a prosecutor would have absolute immunity for maliciously prosecuting someone he or she did not have probable cause to indict.[208] But this statement does little to clarify the ambiguities of the bright-line rule. The Court only explains that absolute immunity was available at common law for malicious prosecution claims while no such common law tradition exists for pre-probable cause investigative acts.[209] The Supreme Court has offered three types of justifications for grants of absolute immunity—"intimate association" with the judicial phase of the criminal process, analogous common law immunity, and public policy.[210] The *Buckley* Court's reference to the common law to justify the apparent anomaly between investigations without probable cause and prosecutions without probable cause, however, seems to ignore the two other justifications.[211] This is especially unsatisfying where the lower courts determining the appropriate level of immunity have generally relied most heavily on the de novo characterization of the prosecutorial acts as advocatory or non-advocatory.[212]

In *Buckley*, the alleged manufacture of false evidence occurred quite early in the investigative process, well before a grand jury was even convened.[213] The Court did not have occasion to consider how this rule would apply if the alleged misconduct had occurred later in the process: for example, after the grand jury had been convened for

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[207] *Id.* at 274.

[208] *See id.* at 274 n.5.

[209] *Buckley*, 509 U.S. at 274 n.5.

[210] *See Burns*, 500 U.S. at 489–92; *Imbler*, 424 U.S. at 422–24, 430; *see also* Giuffre v. Bissell, 31 F.3d 1241, 1252 (3d Cir. 1994) (identifying the three relevant inquiries as (1)analogous common law immunity; (2)risk of harassment or vexation litigation; and (3)alternatives to damage suits for redressing of wrongful conduct).

[211] *See Buckley*, 509 U.S. at 274 n.5.

[212] *See Burns*, 500 U.S. at 491–92; *Imbler*, 424 U.S. at 430.

[213] 509 U.S. at 275.

the purpose of considering an indictment but before actually issuing a specific indictment. It therefore remains unclear whether it is enough that the prosecutor has evidence that *would be* sufficient for an arrest warrant, or whether the prosecutor must have already secured the warrant or some other formal determination of probable cause. If the former is the case, the Court has not indicated on what bases and under what standard of review the court hearing the civil suit should determine whether probable cause existed at the time of the alleged misconduct. Not only does the Court not identify how formal the finding of probable cause must be, but the Court also does not explain who can or must determine the existence of probable cause and at what point in the process—the prosecutor, a grand jury, or perhaps a neutral magistrate during the initial criminal prosecution, or the court hearing the § 1983 or *Bivens* claim.[214]

The Court also failed to address the post-probable cause, pre-indictment situation. The Court did not make clear what level of immunity would be accorded to pre-indictment acts when an appropriate party has formally found probable cause prior to the alleged prosecutorial misconduct, but it is determined later in the process that probable cause did not exist, and that the prosecutor was aware of this fact. The *Buckley* Court suggests that indictment and post-indictment acts enjoy absolute immunity because the common law recognized absolute immunity for wrongful prosecution, that is, the prosecutorial decision to initiate proceedings, with or without actual probable cause underlying the indictment.[215] Yet *Buckley* simply does not explain if its bright-line, pre-probable cause rule applies to the period following an improper finding of probable cause and preceding that prosecutorial decision to initiate proceedings.[216] This seems a special concern where the party initially determining probable cause may have based its finding on false or misleading evidence intentionally submitted by the prosecutor.[217] If the police or the prosecutor knowingly supply a magistrate with false or misleading evidence, the good faith exception may not apply, and the warrant may well be found invalid on review.[218] Yet if the prosecutor

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[214] Kenner, *supra* note 3, at 426.

[215] *Buckley*, 509 U.S. at 274 n.5.

[216] *See id.* at 274.

[217] *See id.* at 288 (Kennedy, J., concurring in part and dissenting in part) ("[I]t is difficult to fathom why securing such a fraudulent determination transmogrifies unprotected conduct into protected conduct.").

[218] *See* United States v. Leon, 468 U.S. 897, 923 (1984). In *Leon*, the Supreme Court created the "good faith exception," modifying the Fourth Amendment exclusionary rule so as not to bar the prosecution's use of evidence seized in reasonable reliance on a facially valid search warrant

remains absolutely immune from civil liability for submitting such evidence to receive a formal finding of probable cause, then the prosecutor may still have some incentive to secure an arrest warrant as early as possible in the criminal process.[219] The Supreme Court does not address these issues, and it is not even clear after *Buckley* whether a prosecutor would have absolute immunity for acts committed during a probable cause hearing itself, where the immediate outcome of the hearing is a finding that probable cause is lacking.[220] In sum, the *Buckley* decision appears to lessen, to some extent, the protections previously afforded prosecutors through the defense of absolute immunity, but it is unclear from the decision itself how exactly the imposition of the bright-line, pre-probable cause guideline affects immunity doctrine.[221] It is this very lack of clarity that has enabled the federal courts to bring their own interpretations, both explicit and implicit, to bear on the law of prosecutorial immunity.[222]

## VI. Prosecutorial Immunity Doctrine as Interpreted by the Lower Federal Courts: Interpretations of *Buckley*'s Bright-Line Rule

Several federal circuit courts have already considered prosecutorial immunity cases in which the plaintiff claimed, inter alia, that the prosecutors acted without probable cause to arrest.[223] The consensus seems to be that a reviewing court's determination that probable cause to arrest was actually lacking at the time of the alleged prosecutorial acts does not implicate the *Buckley* bright-line rule or preclude advocatory categorization, as long as the prosecutorial acts followed an official, albeit mistaken, determination of probable cause.[224] Furthermore, absolute immunity will probably not be withheld for otherwise advocatory acts performed during the arrest warrant probable cause hearing itself, even when the immediate outcome of the hearing is a finding of no probable cause.[225]

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later found to have lacked probable cause. *Id.* at 922. The *Leon* Court specifically retained suppression as the appropriate remedy in three situations, one of which is when the magistrate is misled by information which the affiant "knew was false or would have known was false except for his reckless disregard of the truth." *Id.* at 923.

[219] *See Buckley*, 509 U.S. at 286 (Kennedy, J., concurring in part and dissenting in part).

[220] *See id.* (Kennedy, J., concurring in part and dissenting in part).

[221] *See id.* at 274.

[222] *See infra* notes 223–338 and accompanying text.

[223] *See, e.g.*, Hill v. City of New York, 45 F.3d 653 (2d Cir. 1995); Kohl v. Casson, 5 F.3d 1141 (8th Cir. 1993).

[224] *See, e.g.*, Moore v. Valder, 65 F.3d 189, 191, 192–95 (D.C. Cir. 1995); Reid v. State of New Hampshire, 56 F.3d 332, 336–38, 341 (1st Cir. 1995); *Kohl*, 5 F.3d at 1145–46.

[225] *See Kohl*, 5 F.3d at 1146.

In effect, the potential impact of the *Buckley* holding has yet to be realized by the federal circuit courts. Not only does the bright-line rule only apply to instances in which the prosecutor acts prior to an official determination of probable cause, but also it does not seem to have any effect on the application of immunity analysis outside of this narrow situation.[226] When *Buckley* has not been implicated, the courts have analyzed immunity issues and distinguished advocacy from investigation and administration under the pre-existing *Imbler* functional approach.[227] Thus, while the *Buckley* Court's written opinion seemed to diverge from the pattern of analysis and reasoning established by *Burns* and *Imbler* so as to increase prosecutorial liability, *Buckley*'s actual effect appears surprisingly minimal.[228]

In September 1993, in *Kohl v. Casson*, the United States Court of Appeals for the Eighth Circuit considered what immunity should be accorded to prosecutorial acts undertaken during a period in which the existence of actual probable cause was disputed and ultimately held that the acts were advocatory and deserving of absolute immunity.[229] The court did not consider the lack of probable cause, determined twice in separate pre-trial hearings, as affecting the application of immunity doctrine.[230] The Eighth Circuit seems instead to have implicitly adopted the view that *Buckley*'s bright-line rule does not preclude absolute immunity when probable cause is found lacking following the occurrence of the alleged wrongful acts.[231] Hence *Buckley* did not affect the reviewing court's subsequent application of immunity doctrine, even where the plaintiff claimed that the prosecutor committed the acts knowing that probable cause was lacking.[232]

Kohl was arrested pursuant to a warrant for the theft of a bag containing checks and $3,000 in cash from a van parked outside a restaurant.[233] The prosecutor filed a felony theft charge against Kohl, and law enforcement officials seized approximately $2,000, his car and other property, resulting in Kohl's inability to post bail.[234] After a preliminary hearing in April 1990, the county court ruled that the state had failed to show probable cause that Kohl had committed the crime.[235]

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[226] *See Buckley*, 509 U.S. at 274; *see also* discussion *infra* notes 229–338 and accompanying text.
[227] *See* discussion *infra* notes 229–338 and accompanying text.
[228] *See* discussion *infra* notes 229–338 and accompanying text.
[229] 5 F.3d at 1145.
[230] *See id.* at 1145–47.
[231] *See Kohl*, 5 F.3d at 1145–47.
[232] *See id.*
[233] *Id.* at 1143–44.
[234] *Id.* at 1144.
[235] *Id.*

The prosecutor refiled the charges, and a month later, the state district court again found probable cause lacking and ordered Kohl's release.[236] Kohl filed a § 1983 claim alleging that the investigating officer and prosecutor had arrested and detained him without probable cause.[237] Specifically, Kohl claimed that the prosecutor initiated prosecution while knowing he lacked probable cause to arrest, advised the police on the preparation of the affidavit and then presented it to the magistrate as true and sufficient while knowing he lacked probable cause, and advised the police not to return the money seized from Kohl.[238]

The Eighth Circuit held the prosecutor absolutely immune to the malicious prosecution claim by reasoning that the acts in question were of the type concerning the initiation of prosecution awarded advocatory status in *Imbler*.[239] The court also granted absolute immunity for withholding the money, because during the time it was withheld it constituted potential evidence that might be used if Kohl's prosecution commenced.[240] On both these issues the court failed to consider whether the plaintiff's claim that the prosecutor lacked probable cause had any effect on the *Imbler* functional analysis.[241]

Nor did the court consider the impact of the lack of probable cause on the question of the prosecutor's involvement in the application for the arrest warrant.[242] The court held, rather, that a prosecutor's presentation of an affidavit supporting a warrant application to a magistrate is entitled to absolute immunity insofar as the prosecutor simply presents the evidence and argues the law.[243] The court reasoned that seeking an arrest warrant should not be treated differently from seeking a search warrant, a function held to be advocatory in *Burns*.[244] To the extent, however, that a prosecutor "vouches, of his own accord" for the truth of the affidavit, the Eighth Circuit held that he or she is only entitled to qualified immunity under the 1986 United States Supreme Court decision in *Malley v. Briggs*, which the court construed as granting only qualified immunity for the function of vouching for the truth of the complaint in seeking an arrest warrant.[245]

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[236] *Kohl*, 5 F.3d at 1144.

[237] *Id.* The federal district court denied absolute immunity to the prosecutor, who then appealed this decision to the circuit court. *Id.* at 1145.

[238] *Id.* at 1145, 1147.

[239] *Id.* at 1145.

[240] *Id.* at 1147.

[241] *See Kohl*, 5 F.3d at 1145–47.

[242] *See id.* at 1145–46.

[243] *Id.* at 1146.

[244] *Id.*

[245] *Id.* (citing Malley v. Briggs, 475 U.S. 335, 342 (1986)). The court then concluded that the

Thus, the Eighth Circuit seems to have implicitly held that the absence of actual probable cause does not alter the application of pre-*Buckley* immunity doctrine.[246] The prosecutor enjoys absolute immunity for his or her actions during the probable cause hearing itself, to the extent that he or she does not personally attest to the truth and sufficiency of the evidence presented, even when it is determined relatively shortly after the alleged acts that probable cause was lacking.[247] This result occurs even where the plaintiff's pleadings specifically included the claim that the prosecutor committed the alleged acts, such as presenting the warrant application, knowing that he or she lacked probable cause to arrest.[248]

It may be that the Eighth Circuit used the *Malley* exception, for the prosecutor's personal attestation to the truth of the affidavits supporting the warrant application, as a means of increasing prosecutorial liability where a prosecutor acts *with the knowledge* that he or she lacks probable cause, thereby implicitly interpreting *Buckley* as extending liability to situations prior to an official determination of probable cause.[249] But the Eighth Circuit only cited *Malley* as applicable to the prosecutor's vouching for the truth of the affidavits, not vouching for the sufficiency of the warrant application or the existence of probable cause.[250] Thus, it seems likely that the Eighth Circuit based this part of its holding relying solely on *Malley* without *Buckley* affecting the determination.[251]

In 1995, in *Reid v. New Hampshire*, the United States Court of Appeals for the First Circuit held that two prosecutors were absolutely immune from suit on charges that they had withheld exculpatory evidence in violation of a court's disclosure order.[252] In *Reid*, the plaintiff had been arrested in June 1986, without a warrant, and charged with three counts of felonious sexual assault on a six-year-old girl.[253] Following a probable cause hearing, Reid was bound over for trial.[254] He represented himself at trial, filed five successful motions to compel

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prosecutor had met the qualified immunity standard in presenting the affidavit as true since "reasonable officers could disagree whether probable cause in fact existed." *Id.* at 1147. The court also found the prosecutor's advice to the police officer on the preparation of the affidavit to be entitled to qualified immunity. *Id.*

[246] *See Kohl*, 5 F.3d at 1145–47.

[247] *See id.* at 1146–47.

[248] *See id.* at 1145.

[249] *See id.* at 1145–47.

[250] *Id.* at 1146.

[251] *See Kohl*, 5 F.3d at 1146.

[252] 56 F.3d 332, 336–37 (1st Cir. 1995).

[253] *Id.* at 333–34.

[254] *Id.* at 334.

disclosure of exculpatory evidence, personally cross-examined the State's witnesses and succeeded in having the jury acquit on one count.[255]

Thereafter, he moved to have the convictions on the other two counts set aside, and in response to another motion to disclose exculpatory evidence, the State turned over documents undermining the testimony of the alleged victims, her sister and mother.[256] The superior court hearing Reid's motion concluded that this evidence, including a report prepared by the investigating officer and a file maintained by the New Hampshire Child Welfare Agency, constituted exculpatory impeachment evidence.[257] Consequently, in October 1988, the court set aside the two convictions and ordered a new trial.[258] In December 1988, all charges against Reid were dropped.[259]

Reid filed his original civil rights complaint in federal district court claiming, inter alia, that the two prosecutors in his case caused him to be deprived of his liberty without probable cause, and that they withheld exculpatory evidence in violation of his constitutional rights.[260] He also alleged that the police arrested him on the basis of unreliable information.[261] The district court magistrate recommended that the claims against the prosecutors be dismissed on the grounds of absolute prosecutorial immunity, and the district court adopted the recommendation.[262] On appeal, the First Circuit held that the prosecutors' withholding of exculpatory evidence, even in direct violation of court orders to disclose, was clearly deserving of absolute immunity under *Imbler*, which provided that level of immunity for the knowing suppression of exculpatory information, even if specifically requested by the defense.[263] In response to Reid's argument that the court orders to disclose had displaced any prosecutorial discretion which would impli-

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[255] *Id.*

[256] *Id.*

[257] *Reid*, 56 F.3d at 334.

[258] *Id.*

[259] *Id.*

[260] *Id.* Reid filed three amended complaints which further developed and altered his characterization of the prosecutors' acts. *Id.* at 335–36. The third amended complaint finally alleged that the prosecutors knew of the exculpatory evidence but failed to disclose it to defense counsel or, in the alternative, they disclosed the evidence to defense counsel but enlisted him in a conspiracy to conceal that evidence from the defendant and the court. *Id.* at 336.

[261] *Id.* at 334.

[262] *Reid*, 56 F.3d at 335. The district court dismissed the claims against the prosecutors following the filing of the first amended complaint. *Id.* The second amended complaint did not mention the prosecutors, but Reid reasserted his prosecutorial misconduct claims in the third amended complaint, which the district court refused to adopt insofar as it renewed the claims against the prosecutors. *Id.* at 336, 339.

[263] *Id.* at 336–37.

cate the policy concerns underlying immunity doctrine, the court reasoned that the prosecutors retained the discretionary task of determining what evidence qualified for disclosure under the court's broad request for exculpatory evidence.[264] The First Circuit further held that the prosecutors' acts of repeatedly misleading the trial court to conceal their withholding of the evidence was subject to absolute immunity because *Burns* granted absolute immunity for false and defamatory statements made during, and related to, judicial proceedings.[265]

Yet the First Circuit did not consider what effect Reid's claim that there was no probable cause to arrest had upon the prosecutors' immunity.[266] The court dealt with the issue by summarily noting that Reid's claim failed to implicate the prosecutors in the arrest, and therefore Reid failed to state a false arrest claim against them.[267] Yet when the First Circuit ultimately considered the false arrest claim against the police officers, it questioned the district court's finding that an objectively reasonable police officer, based on all the evidence including that withheld, could have believed there was probable cause to arrest Reid.[268] In reversing the district court's grant of summary judgment as to the police officers, the First Circuit noted that Reid was entitled to submit interrogatories to the police defendants to determine when they learned of the exculpatory evidence.[269] The court reasoned that the timing of their knowledge was relevant to whether they could have reasonably believed they had probable cause and to whether the police officers initiated the prosecution knowing that they lacked probable cause.[270]

The First Circuit explicitly cast doubt on the existence of probable cause underlying Reid's arrest and the initiation of his prosecution.[271] Yet the court never suggested that a finding on remand that probable cause had been lacking would recharacterize the prosecutors' actions

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[264] *Id.* at 337. In *Brady v. Maryland*, the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment." 373 U.S. 83, 87 (1963). The *Brady* rule requires disclosure to the defendant in a criminal case of evidence that is both favorable to the defendant and material either to guilt or sentencing. United States v. Bagley, 473 U.S. 667, 674 (1985). The Supreme Court has held that "material" evidence is evidence that "might have affected the outcome of the trial." United States v. Agurs, 427 U.S. 97, 104 (1976).

[265] *Reid*, 56 F.3d at 337.

[266] *Id.* at 335, 336–38.

[267] *Id.* at 336.

[268] *Id.* at 341.

[269] *Id.* at 341–42.

[270] *Reid*, 56 F.3d at 341–42.

[271] *Id.* at 341.

as non-advocatory.[272] While *Buckley*'s bright-line rule could arguably support a conclusion that the post-trial finding of an initial and continuing lack of probable cause to arrest rendered the prosecutors' trial activities subject only to qualified immunity, the First Circuit granted absolute immunity without addressing this possibility.[273] Instead, the court seemed to focus on the *Imbler* functional test, holding that an activity so intimately connected in time and nature to the trial itself must be advocatory.[274] Thus, the First Circuit appears to have interpreted the *Buckley* bright-line rule as not precluding advocatory characterization where there has been an official finding of probable cause, even if that finding may have been tainted by the withholding of exculpatory evidence.[275]

In 1995, in *Moore v. Valder*, the United States Court of Appeals for the District of Columbia Circuit appeared to agree that the fact that a reviewing court determines that probable cause was actually lacking at the time of the alleged prosecutorial acts does not alter the application of the pre-*Buckley* immunity analysis.[276] Moore had been indicted in 1988 on multiple counts of theft and fraud in connection with a scheme to defraud the federal government.[277] He was charged, inter alia, with persuading an executive search company president, who had been hired by the U.S. Postal Service to identify candidates for Postmaster General, to recommend a candidate who favored using a type of address-scanner marketed by Moore's corporation.[278] At the close of the government's case, Moore's motion for a judgment of acquittal was

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[272] *See id.* at 336, 342.

[273] *See id.* at 336; *see also Buckley*, 509 U.S. at 274 ("A prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested.").

[274] *See Reid*, 56 F.3d at 336–37.

[275] *See id.*; *see also* Guzman-Rivera v. Rivera-Cruz, 55 F.3d 26 (1st Cir. 1995). In *Guzman-Rivera*, another prosecutorial immunity case, the First Circuit held three prosecutors ex officio absolutely immune from suit under *Imbler* for their failure to go to court to undo a wrongful conviction, but granted only qualified immunity for their actions during the post-conviction reinvestigation of the case. *Guzman-Rivera*, 55 F.3d at 28, 30–31. The First Circuit analogized to the situation in *Buckley*, describing the case before it as "mirroring" that in *Buckley* in the post-trial context, to justify its withholding of absolute immunity. *Id.* at 30. Because the prosecutors were merely acting as investigators for the civil rights division, and because no post-conviction proceeding was yet pending, the court held that the acts were investigatory in nature. *See id.* Arguably, the same result would have been dictated by the *Imbler* functional approach, even in the absence of *Buckley*, where the prosecutor-defendants did not handle the underlying prosecution and were investigating a civil rights complaint not only as advocates for the state but also on Guzman's behalf. *See id.*

[276] Moore v. Valder, 65 F.3d 189, 191, 192–95 (D.C. Cir. 1995).

[277] *Id.* at 191.

[278] *Id.*

granted on the grounds that there was insufficient evidence that Moore knew of such a scheme.[279]

Moore then filed a *Bivens* claim in federal district court against the prosecutor and others for malicious and retaliatory prosecution.[280] Specifically, Moore claimed that the prosecutor, knowing Moore was unaware of the fraud, initiated prosecution in retaliation for his criticisms of Postal Service procurement policies and his recommendations to the President of the United States of certain candidates for Postmaster General.[281] In this complaint, and in a separate complaint filed against the United States under the Federal Tort Claims Act and later consolidated with the first, Moore claimed that the prosecutor had stated, in the presence of a grand jury witness, that he did not care if Moore was actually guilty because he wanted a "high-profile" indictment, that he intimidated and coerced witness testimony, that he presented this misleading testimony to the grand jury while concealing exculpatory evidence and that he disclosed grand jury testimony to third parties.[282]

The D.C. Circuit granted only qualified immunity for the intimidation and coercion of witnesses and the disclosure of grand jury testimony to third parties.[283] The court reasoned that witness interviews are advocatory when designed to explore "whether witness testimony is truthful and complete and whether the government has acquired all incriminating evidence," and the abuse of that function by the prosecutor rendered the act investigatory.[284] The court analogized the disclosure of grand jury testimony to third parties to the statements to the press that received only qualified immunity in *Buckley*.[285]

The court, however, granted the prosecutor absolute immunity from suit for his decision to prosecute Moore, concealment of exculpatory evidence from the grand jury, manipulation of evidence before the grand jury and withholding of exculpatory evidence after indictment and before trial.[286] The D.C. Circuit bolstered its holding by citing

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[279] *Id.*

[280] *Id.*

[281] *Moore*, 65 F.3d at 191.

[282] *Id.* at 191–92. Prior to transferring the remaining claims to the District Court for the District of Columbia for lack of personal jurisdiction, the District Court for the Northern District of Texas dismissed the claims against the prosecutor on the grounds of absolute immunity. *Id.* at 192.

[283] *Id.* at 194–95.

[284] *Id.* at 194. The court concluded that the witness intimidation "therefore related to a typical police function, the collection of information to be used in a prosecution." *Id.*

[285] *Id.* at 195.

[286] *Moore*, 65 F.3d at 194.

to the Second Circuit's decision in *Hill v. City of New York*, to support the proposition that absolute immunity attaches to the withholding of exculpatory evidence from the grand jury.[287] The court then cited to both *Hill* and the Fourth Circuit's opinion in *Carter v. Burch*, for the proposition that absolute immunity is accorded to the post-indictment withholding of exculpatory evidence from defense counsel.[288] It seems then that the D.C. Circuit has approved, and possibly implicitly adopted, the Second Circuit's reasoning that the absence of actual probable cause will not destroy absolute immunity for post-initiation/pre-indictment or post-indictment acts otherwise considered advocatory under the *Imbler* functional approach.[289] To that extent, the D.C. Circuit seems to agree that the lack of actual probable cause, determined on review, does not affect the application of pre-existing immunity doctrine.[290]

By citing *Carter* for the broad proposition that absolute immunity attaches to the withholding of exculpatory evidence from defense counsel, the D.C. Circuit also implicitly approved the Fourth Circuit's more narrow and questionable holding that absolute immunity would attach to any withholding of exculpatory evidence that followed the suspect's *arrest*.[291] But a stronger interpretation of *Moore* finds the D.C. Circuit merely extending the absolute immunity accorded to the post-indictment withholding of evidence under *Imbler* to the same act performed during the *pre*-indictment stage.[292] It thus appears that the D.C. Circuit has not allowed the issue of actual probable cause raised by *Buckley* to bear on the application of immunity doctrine in the post-initiation context, even where the plaintiff's case is predicated on a claim of baseless, retaliatory prosecution and where the initiation proceedings were tainted by the prosecutor's manipulation of the evidence.[293]

In a few instances to date, the *Buckley* holding has affected the outcomes in prosecutorial misconduct cases, indicating the narrow, but undeniable reach of the *Buckley* decision.[294] In 1994, in *Hummel-Jones v. Strope*, the Eighth Circuit considered a situation in which the chal-

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[287] *See id.*; *see also* Hill v. City of New York, 45 F.3d 653, 661–62 (2d Cir. 1995) (discussed *infra* notes 313–32 and accompanying text).

[288] *See Moore*, 65 F.3d at 194; *see also Hill*, 45 F.3d at 662 (discussed *infra* notes 313–32 and accompanying text); Carter v. Burch, 34 F.3d 257, 262 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 1101 (1995) (discussed *infra* note 332). Both *Hill* and *Carter* were decided after *Buckley*.

[289] *See Moore*, 65 F.3d at 194.

[290] *See id.*

[291] *See id.*; *see also Carter*, 34 F.3d at 262.

[292] *See Moore*, 65 F.3d at 194. The court stated that "it follows from *Imbler* that the failure, be it knowing or inadvertent, to disclose material exculpatory evidence before trial also falls within the protection afforded by absolute prosecutorial immunity." *Id.*

[293] *See id.* at 191, 192–95.

[294] *See* Hill v. New York, 45 F.3d 653 (2d Cir. 1995); Carter v. Burch, 34 F.3d 257 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 1101 (1995); Hummel-Jones v. Strope, 25 F.3d 647 (8th Cir. 1994).

lenged prosecutorial acts not only took place in the complete absence of probable cause to arrest but also in a context in which the plaintiffs were not even the intended targets of the prosecutorial inquiry.[295] The court held that the prosecutors were only entitled to a qualified immunity defense for their participation in a search that violated the rights of a couple who were not the nominal subject of the search.[296] The Eighth Circuit cited *Buckley* for the denial of absolute immunity in this context, adopting *Buckley*'s reasoning that in the absence of probable cause to arrest, the prosecutor's search for evidence must be considered investigatory.[297]

Hummel-Jones, her husband and toddler were staying at a birthing clinic following the birth of their child.[298] An investigator for the local Board of Healing Arts became convinced that the nurse at the clinic was delivering a baby without a license to practice medicine and contacted the local sheriff.[299] An off-duty deputy posed as a United States serviceman with car trouble to gain admittance to the clinic and then used the phone to call waiting officers and inform them of the presence of the newborn infant.[300] Later that same night, officers got the local prosecutor to prepare an application for a search warrant, and a magistrate issued the warrant, though the affidavit included only conclusory statements and referred to the off-duty sheriff only as a "confidential informant," not describing the way in which he gained access to the clinic.[301] At 2 A.M., four armed officers, two prosecutors and the Board inspector raided the clinic, and over the course of three and a half hours, detained, questioned and photographed the family members, searched Hummel-Jones's bag without consent, and seized banking slips and a videotape.[302] The couple subsequently filed suit under § 1983 claiming that the participants in the raid violated the couple's Fourth and Fourteenth Amendment rights by conducting an unlawful search and seizure.[303]

The Eighth Circuit noted that the prosecutors were not entitled to absolute immunity for their participation in the search and would

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[295] *See* 25 F.3d at 649.

[296] *Id.* at 649, 653 n.10.

[297] *See Hummel-Jones*, 25 F.3d at 653 n.10 (construing *Buckley*, 509 U.S. at 273–74).

[298] *Hummel-Jones*, 25 F.3d at 649.

[299] *Id.*

[300] *Id.*

[301] *Id.*

[302] *Id.*

[303] *Hummel-Jones*, 25 F.3d at 650. The district court granted summary judgment to all the defendants, and the couple appealed both the finding that there was no constitutional violation and the finding that the defendants were protected by qualified immunity. *Id.*

be held to the qualified immunity standard.[304] In considering whether the defendants had met the qualified immunity standard, the court held that no objectively reasonable law enforcement officer could have believed that the search met the Fourth Amendment's basic reasonableness requirement.[305] The court reasoned that not only was the conduct of the search unreasonable, but the possession of a warrant did not excuse or mitigate that unreasonableness, especially where the warrant application did not mention the family's presence at the clinic.[306] The court held, thus, the prosecutors were not entitled to summary judgment based on the defense of qualified immunity and would have to go to trial on the merits of Hummel-Jones's claim.[307]

The Eighth Circuit reasoned that the denial of absolute prosecutorial immunity was a result clearly dictated by *Buckley*.[308] Indeed, *Hummel-Jones* presents a clear example of the type of situation to which the *Buckley* bright-line rule apparently applies.[309] The defendant-prosecutors never claimed that they had probable cause to arrest anyone prior to the search, and they certainly had no reason to suspect the couple of any wrongdoing.[310] As part of the search party, the prosecutors, so far as the facts indicate, performed a function identical to that of the law enforcement officers.[311] Yet *Hummel-Jones* raised no issue as to the timing of the probable cause determination and therefore did not require the court to explore the boundaries of the *Buckley* bright-line rule.[312]

In 1995, in *Hill v. City of New York*, the United States Court of Appeals for the Second Circuit considered a § 1983 suit against a prosecutor which included the claim he coerced witness testimony

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[304] *See id.* at 652, 653 n.10. The court also noted that there remained material questions of fact as to who "participated in, ordered, or condoned" the particular acts allegedly committed during the search. *Id.* at 653 n.10.

[305] *Id.* at 653.

[306] *Id.* at 650, 651. The court noted that the search was conducted during the night primarily to ensure the family's presence on the premises. *Id.* at 650. The withholding of this information therefore prevented the magistrate from considering the family's privacy interests when issuing the warrant. *Id.* at 651.

[307] *Id.* at 653.

[308] *Hummel-Jones*, 25 F.3d at 653 n.10.

[309] *See Buckley*, 509 U.S. at 274; *Hummel-Jones*, 25 F.3d at 649–50.

[310] *See Hummel-Jones*, 25 F.3d at 649; *see also Buckley*, 509 U.S. at 274 (holding a prosecutor's acts non-advocatory prior to existence of probable cause to arrest). The court wisely noted that "giving birth, of course, is not illegal." *Hummel-Jones*, 25 F.3d at 649 n.4.

[311] *See Hummel-Jones*, 25 F.3d at 649, 653 n.10; *see also Buckley*, 509 U.S. at 273–74 (noting that qualified immunity is appropriate where the prosecutor performs an investigative function normally performed by law enforcement detectives).

[312] *See Hummel-Jones*, 25 F.3d at 649–50.

during videotaped interviews prior to, and in pursuit of, probable cause to arrest.[313] The court, faced with a more difficult and telling situation in which the alleged prosecutorial acts occurred as probable cause was being amassed, gave limited effect to the *Buckley* bright-line rule and noted that the prosecutor was not entitled to absolute immunity for the interviews if those interviews were conducted *in the absence of* probable cause to arrest Hill and *for the purpose of* securing evidence to establish that probable cause.[314] Yet the Second Circuit did not suggest that the post-indictment realization that probable cause had been lacking in any way threatened the absolute immunity accorded to the prosecutor's post-arrest acts, including withholding exculpatory evidence from the grand jury.[315]

Hill claimed that an assistant district attorney and other defendants engaged in a conspiracy to manufacture false evidence against her in connection with the investigation of alleged sexual abuse of her five-year-old son.[316] Specifically, Hill charged that when the prosecutor had received contradictory accounts of the abuse from the victim he manufactured probable cause against Hill by coaching the child's testimony in two videotaped interviews.[317] Hill claimed that when, during the first taped session, the child named his former foster brother as his abuser, the prosecutor abruptly ended the session.[318] The second taped interview, during which the prosecutor had allegedly encouraged the child to name his mother, was used to establish probable cause to arrest and indict Hill.[319] The prosecutor did not inform the grand jury of the existence or content of the first tape, and he subsequently filed two court documents stating that no exculpatory evidence existed.[320] Only after a copy of the first interview was mistakenly sent to Hill's counsel was the indictment dismissed.[321] A year later, Hill filed suit under § 1983, claiming the prosecutor had manufactured evidence to establish probable cause to arrest her.[322]

The Second Circuit held that the prosecutor had only qualified immunity for directing that Hill's children be removed from their

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[313] 45 F.3d 653, 658 (2d Cir. 1995).

[314] *See id. at 662–63.*

[315] *See id.* at 661–62.

[316] *Id.* at 656.

[317] *Id.*

[318] *Hill*, 45 F.3. at 658.

[319] *Id. at 658.*

[320] *Id.*

[321] *Id.*

[322] *Id.* at 656. The Second Circuit's *Hill* decision is the defendants' appeal, following the district court's denial of their motion to dismiss. *Id.* at 659.

home, for telling the police they had probable cause to arrest Hill, and for the videotaped interviews, but the prosecutor had absolute immunity for the post-arrest acts of alleged malicious prosecution, withholding evidence from the grand jury and withholding *Brady* evidence from the court.[323] The court reasoned that the pre-arrest acts of ordering the children's removal and advising the police were both investigatory under *Burns*, not because they occurred prior to the existence of probable cause, but because they were non-advocatory under the functional approach.[324] The court also found that the misconduct before the grand jury and the court was advocatory and thus protected by absolute immunity under *Imbler* and *Burns*.[325]

The court referred, however, to *Buckley* to decide the issue of the taped interviews.[326] The Second Circuit reasoned that even though the time frame was much more collapsed in the instant case than it had been in *Buckley*, the fact that the tape was used to establish probable cause dispositively demonstrated that the act of making the tape occurred before probable cause to arrest existed.[327] Hence, the court held that the act was non-advocatory and subject only to qualified immunity.[328]

Interestingly, at no time did the court use *Buckley* to suggest that the prosecutorial acts following the official determination of probable cause were tainted by the actual lack of probable cause.[329] Thus, the Second Circuit, along with the Eighth Circuit in *Kohl v. Casson* and the D.C. Circuit in *Moore v. Valder*, appears to have interpreted *Buckley* as holding that a prosecutor does not act as an advocate prior to the time someone has secured an *official determination* of probable cause to arrest.[330] The Second Circuit implicitly reasoned that once probable cause has been officially recognized, as by the issuance of an arrest warrant or the finding of a probable cause hearing, subsequent prosecutorial acts will be reviewed under the pre-existing, apparently unchanged *Imbler-Burns* functional analysis.[331] This appears to be true even if that official determination of probable cause is later found to have been based on incomplete evidence.[332]

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[323] *Hill*, 45 F.3d at 661, 662.

[324] *See id.* at 661.

[325] *See id.*

[326] *Id.* at 662.

[327] *Id.*

[328] *Hill*, 45 F.3d at 662–63.

[329] *See id.* at 661–63.

[330] *See id.* ; *supra* notes 229–51, 276–93 (discussing *Kohl* and *Moore*).

[331] *See Hill*, 45 F.3d at 661–63.

[332] *See id.* at 658; *see also* Carter v. Burch, 34 F.3d 257 (4th Cir. 1994), *cert. denied*, 115 S. Ct.

It is clear that the federal circuit courts have yet to fully define the contours of the *Buckley* decision. But while no circuit court has explicitly questioned or criticized any aspect of *Buckley*, they have collectively revealed a pattern of mostly implicit interpretation that suggests *Buckley* will be read narrowly—so narrowly that whatever change to immunity doctrine it purported to make has largely been vitiated.[333] It is likely that the only situation in which the *Buckley* bright-line rule will supply the dispositive analysis is when challenged prosecutorial acts occur in the absence of any official determination of probable cause.[334] Since most prosecutorial functions take place after arrest, relatively few fact patterns should include cognizable claims of prosecutorial misconduct absent an official determination. Those acts that do occur prior to a formal probable cause determination will often relate to the prosecutor's participation in investigations. If this is the conduct at which the *Buckley* bright-line rule was aimed, then to a considerable extent *Buckley* seems only to reinforce a result already commanded by *Imbler* and *Burns*.[335]

What *Buckley* adds to existing immunity doctrine is perhaps no more than the reasoning that acts undertaken prior to an official determination of probable cause to arrest are likely always to be non-advocatory under a functional analysis because they lack any certain link to a judicial proceeding already begun and certain to take place.[336] In effect, this amounts to a mere gloss on the pre-existing *Imbler* functional analysis.[337] Though it is unclear whether the apparent vitiation of *Buckley*'s holding should be attributed to the federal circuit courts, or to the United States Supreme Court for its drafting of an ambiguous decision, it seems, as of this date, that *Buckley*'s dramatic reception was premature and ultimately unwarranted.[338]

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1101 (1995). The Fourth Circuit deciding *Carter* appeared to apply post-*Buckley* immunity doctrine much like the Second Circuit, reverting to the pre-existing *Imbler-Burns* functional determination for any act falling on the judicial-process side of the *Buckley* bright-line. *See Carter*, 34 F.3d at 262–63 (citing *Imbler* for grant of absolute immunity for withholding exculpatory evidence before trial). The *Carter* court, however, intimated that *arrest* demarcates that line, rather than the official determination of probable cause. *See id.* at 262 ("the alleged fabrication of evidence occurred before an *arrest*, and thus before the judicial process had been implicated") (emphasis added).

[333] *See supra* notes 229–332 and accompanying text.

[334] *See supra* notes 229–332 and accompanying text.

[335] *See Burns*, 500 U.S. at 493 (holding that advising police during investigatory phase is not advocatory); *Imbler*, 424 U.S. at 430, 431 n.33 (withholding absolute immunity for an act not an integral part of judicial process).

[336] *See* 509 U.S. at 274.

[337] *See Imbler*, 424 U.S. at 430, 431 n.33 (recognizing possibility of non-advocatory characterization of prosecutorial acts prior to initiation of prosecution).

[338] *See* discussion *supra* parts IV–V.

## VII. Conclusion

The Supreme Court's 1993 decision in *Buckley v. Fitzsimmons* was heralded as cutting back on what had historically been a highly deferential doctrine of absolute prosecutorial immunity by imposing a bright-line rule on the pre-existing functional approach of *Imbler*: no act can or should be considered advocatory prior to the time the prosecutor has probable cause to arrest.[339] On its face, this rule appears to contradict the reasoning underlying previous prosecutorial immunity decisions, to create ambiguities as to the proper application of immunity doctrine, and certainly to withhold absolute immunity in circumstances where it previously had been assured. Whatever opportunity *Buckley* offered, however, to federal courts anxious to cut back on prosecutorial privileges has not yet been seized. The federal courts have not used *Buckley*'s arguably ambiguous holding to significantly alter their application of immunity doctrine. Rather, it appears that the long-standing tradition of prosecutorial immunity has endured whatever threat may have been posed by *Buckley v. Fitzsimmons*. *Buckley*'s promise of greater liability for prosecutorial misconduct, a position which provoked a five-to-four split among the Court and a dissent predicting upheaval and incongruity in future immunity decisions, has been largely forsaken by federal circuit courts either uncertain of the intended reach of *Buckley*'s holding or unwilling to impose any new burdens on the prosecutor.

Megan M. Rose

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[339] *See Buckley*, 509 U.S. at 274.